THE INTERNATIONAL ECONOMIC ORDER: A TRIGGER FOR GLOBAL JUSTICE AND THE RIGHT TO DEVELOPMENT?

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ABSTRACT

The international economic order is unfair. The global order continues to maintain values and practices that sustain the dominance of certain states, entities, and interests to the detriment of the fundamental freedoms and development needs of the vulnerable global population. It subordinates essential fundamental values, such as economic, social, and political rights; social justice; and sustainable development to a peripheral status, while mainstreaming the obdurate commitment to an unfettered liberalisation pursuit that mainly favours a privileged few. The institutions overseeing the international trade, finance and investment regimes still preserve the colonial legacies of power-imbalance, inequity, exploitation, and policies that safeguard the continual economic dependence of poorer countries on some affluent entities. Therefore, relying on legal evaluations, empirical findings, historical analyses, and political theories, this thesis argues that the inescapability of participating in the global system and its hurtful effects on the global less-fortunate trigger an obligation to reform the international economic and trade regimes.

In addressing this crisis, this thesis combines global distributive justice theory, the right to development, and the Third World critical approaches to international law in proposing five conceptual principles that could remedy these normative shortcomings. Furthermore, it normatively critiques the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), particularly the prohibited export and local content subsidies, through the lenses of the conceptual principles that it proposes, as case study. It also relied on the infant industry economic theory in establishing the need to grant less-industrialised countries the policy space to implement strategies that may enhance their prioritised industrial development goals and other welfare objectives. It thereafter offers three proposals to improve the equitableness of the SCM Agreement. Specifically, this thesis proposes the creation of a special class of subsidy (named "Non-Actionable Developmental Subsidies") to shield (or limit) the usage of certain development-justifiable subsidies from potential countervailing actions. Also, it explores how the theory of *grundnorm* can be adopted through a proposed "Development Supremacy Clause" with the view of prioritising the proposed human rights and development-centred principles in WTO Agreements. Finally, it offers some thoughts to improve the effectiveness and operationalisation of the Special and Differential Treatment provisions in WTO Agreements.

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ABBREVIATIONS

ACWL	Advisory Centre of the WTO
AfCFTA	African Continental Free Trade Agreement
AoA	Agreement on Agriculture
DFS	Development Facilitation Subsidies
DSB	Dispute Settlement Body
DSC	Development Supremacy Clause
DSU	Dispute Settlement Understanding
ECC	European Economic Community
EPZ	Export Processing Zone
EU	European Union
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
FtAIL	Feminist Approaches to International Law
GATT	General Agreement on Tariffs and Trade
GDJ	Global Distributive Justice
GDP	Gross Domestic Product
GNP	Gross National Product
HDI	Human Development Index
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IEI	International Economic Institution
IEO	International Economic Order
IMF	International Monetary Fund

ITO	International Trade Organisation
LDC	Least-Developed Country
MDG	Millennium Development Goals
MFN	Most Favoured Nation
NADS	Non-Actionable Development Subsidies
NAIL	New Approaches to International Law
NGO	Non-Governmental Organisation
NIC	Newly Industrialised Countries
NIEO	New International Economic Order
OEEC	Organisation for European Economic Cooperation
OHCHR	Office of the High Commissioner for Human Rights
RTD	Right to Development
SAP	Structural Adjustment Programmes
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDG	Sustainable Development Goals
SDT	Special and Differential Treatment
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TNC	Transnational Corporation
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNDRD	United Nations Declaration on the Right to Development
WTO	World Trade Organization

CHAPTER ONE

1.0. INTRODUCTION

1.1. Background and Overview

This thesis is premised on the central claim that the international economic order (IEO) lacks fairness.[1] The global order continues to maintain values and practices that sustain the dominance of certain states, entities, and interests to the detriment of the development objectives of the larger world. Fundamental values that are grounded on the ethical idea of "respect for persons",[2] such as human rights, social justice, and sustainable development, are considered as peripheral to the purely profit-making or commercial objectives of the prevailing economic order. In alienating those fundamental values from mainstream economic concerns, they are simply dismissed as "value judgements",[3] or classified as "non-economic objectives",[4] especially among contemporary positivist economists. By extension, the international economic legal regimes, which mainly comprise of trade, investment, and finance, have been significantly segregated from other instruments of international law that could challenge its uncompromising commitment towards the values of trade liberalisation and the protection of investments – even at the expense of fundamental human rights and critical development concerns. Annett, while commenting on this deplorable status quo, declared that "the dominant economic paradigm is facing a crisis of legitimacy".[5]

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[1] For similar claims on the unfairness or unjustness of the global economic system from the perspectives of law, philosophy and economics, respectively, see the following: John Linarelli, Margot E Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press 2018); Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford University Press 2012); Joseph E Stiglitz, *Globalization and Its Discontents* (W W Norton & Co 2002).

[2] For an explanation on the concept of respect for persons, see: John D Hodson, 'The Ethics of Respect for Persons' in John D Hodson (ed), *The Ethics of Legal Coercion* (Springer Netherlands 1983).

[3] For alternative views that deconstruct the avoidance of ethics, values, or moral philosophy among contemporary economists, see, Julie A Nelson, 'Economists, Value Judgments, and Climate Change: A View from Feminist Economics' (2008) 65 Ecological Economics 441; 'Economists Cannot Avoid Making Value Judgments' [2018] *The Economist* <https://www.economist.com/finance-and-economics/2018/02/24/economists-cannot-avoid-making-value-judgments> accessed 30 April 2021.

[4] Andrea Maneschi, 'Noneconomic Objectives in the History of Economic Thought' (2004) 63 The American Journal of Economics and Sociology 911.

[5] Anthony Annett, 'Restoring Ethics to Economics: Modern Economics Should Return to its Roots' (2018) 55 Finance & Development 54.

This legitimacy crisis can be better observed if one considers factors such as the growth of various anti-globalisation movements. These include the protests and turmoil at almost every major meeting of the international economic institutions (IEIs); the agitations in developing countries against the largely impoverishing effects of the Structural Adjustment Programmes (SAPs) imposed by the IEIs; and the fact that the Doha Development Round, which is the latest round of trade negotiations among the WTO membership with the aim of addressing the asymmetries in the international trading system, ended in a deadlock. These examples are reactions to the dominant perception (especially among developing countries) that the IEO has not only been unable to fulfil its promises to address development issues, such as poverty, hunger, quality of life, inequality, inequity, and income growth, but the policies emanating from the unfair system have, in fact, complicated the achievement of those progressive interests.[6]

In attempting to address these fundamental issues, scholars and commentators of diverse realms have explored various approaches towards that global concern. For instance, Stiglitz has written extensively from a purely economic perspective on the discontents of globalisation and has proffered multiple economic solutions to remedy the unfairness of the IEO, which he alleges to be responsible for the escalating global inequality.[7] Similarly, legal academics like Garcia and Linarelli have mostly tackled the issue by combining critical legal analysis and political theories in demonstrating why the IEO is unjust and as such requires a genuine normative re-evaluation.[8] From philosophical perspectives, different philosophers have also provided theoretical foundations upon which fairness in the IEO should be conceived in order to justify policies that may bring about the needed global economic justice. For instance, James, relying on the social contract philosophical tradition, described how fairness should be understood in the context of the global economy. He argued that the nature of the global economic relations generate significant

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[6] See generally, Kema Irogbe, *The Effects of Globalization in Latin America, Africa, and Asia: A Global South Perspective* (Lexington Books 2014).

[7] For examples, see, Joseph Stiglitz, *People, Power, and Profits: Progressive Capitalism for an Age of Discontent* (Penguin UK 2019); Joseph Stiglitz, *The Great Divide* (Penguin UK 2015); Joseph Stiglitz, *Making Globalization Work* (W W Norton & Company 2007); Joseph Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford University Press USA - OSO 2006).

[8] Frank J Garcia, *Global Justice and International Economic Law: Three Takes* (Cambridge University Press 2013); Frank J Garcia, 'Justice, the Bretton Woods Institutions and the Problem of Inequality' [2008] Boston College Law School Legal Studies Research Paper; Frank J Garcia, 'Trade and Inequality: Economic Justice and the Developing World' (1999) 21 Michigan Journal of International Law 975; John Linarelli, 'What Do We Owe Each Other in the Global Economic Order: Constructivist and Contractualist Accounts' (2005) 15 Journal of Transnational Law & Policy 181.

egalitarian obligations of fairness, independently of humanitarian, human rights, or other justice concerns for how benefits and burdens should be distributed across countries of different development levels.[9] Some other authors have based their arguments for a better IEO on human rights by establishing the intersection between international human rights instruments and international economic law.[10] Some legal scholars have also developed various critical legal methodologies, such as the Third World Approaches to International Law (TWAIL), to deconstruct the conventional legal thoughts and practices associated with international economic law.[11]

While this thesis is primarily rooted in International Economic Law, it adopts a multidisciplinary approach, comprising of legal and political philosophy, economic theories, critical legal approach, human rights, and development studies, in establishing the unjustness of the IEO, and further justifying that its undesirable effect is indeed a trigger for the obligation of global distributive justice and the operationalisation of the fundamental human right to development in its policies.

This thesis is provoked by a number of considerations. The first is the disquieting data on global poverty and hunger, and the role that the IEO can play in resolving this global crisis. For instance, according to the United Nations Food and Agriculture Organisation (FAO), there were at least 820 million malnourished persons documented globally in 2019, with over 85% of them located in Sub-Saharan Africa, the Pacific and Asia.[12] While the cause of poverty can be liked to a combination of several internal and external factors, there is a significant linkage between the rules imposed by the institutions established to manage international economic relations and this deplorable statistic.[13]

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[9] James (n 1).
[10] David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge University Press 2009); Emma Larking, Sharon Friel and Anne Marie Thow, 'Protecting the Human Right to Food in the Sphere of International Trade and Investment' (Social Science Research Network 2017) SSRN Scholarly Paper ID 3083853; *For a similar analysis in a regional context, see,* Christian Riffel, 'Human Rights Protection in the Asia-Pacific: What Will Be the Role of the TPP?' (2016) 14 Otago Law Review 339.
[11] James Thuo Gathii, 'Third World Approaches to International Economic Governance' (Social Science Research Network 2008) SSRN Scholarly Paper ID 1624924; BS Chimni, 'Critical Theory and International Economic Law: A Third World Approach to International Law (TWAIL) Perspective', *Chapters* (Edward Elgar Publishing 2013).
[12] Food and Agriculture Organization of the United Nations, 'The State of Food Security and Nutrition in the World (2019)' <http://www.fao.org/state-of-food-security-nutrition/en/> accessed 30 April 2021.
[13] *See generally,* UNCTAD, 'Trade and Development Report 2020: From Global Pandemic to Prosperity for All - Avoiding Another Lost Decade'; Thomas Winfried Menko Pogge, *World Poverty and Human Rights* (Polity 2008); Stiglitz, *Globalization and Its Discontents* (n 1).

Secondly, there is the critical need to alter the largely subordinate role of less-industrialised countries in the global value chain through industrial development policies. The current international trading rules have significantly constrained the policy space through which developing countries may implement strategies that could help to develop their domestic industries to such an extent that they can attain competitiveness in the global market. Some economists, such as the proponents of dependency theory, have argued that the rules of the IEO are designed to continue to make the developing countries of the Global South dependent on their developed counterparts.[14] As it currently stands, it is accurate to claim that the main comparative advantages of many developing countries in the global value chain are raw materials and cheap labour. This status quo, in addition to various unfair trade practices, has substantially hindered the development of the infant industries in sectors where most developing jurisdictions have a better potential of having a comparative advantage.

Thirdly, the persistent conflicts that arise between international economic policies and essential human rights and development values demand the need for a normative critique of the regimes of the global economic order. This thesis argues that principles that are anchored in development, human rights, and global distributive justice should be held as the foremost consideration while enacting and adjudicating international economic agreements. The current regime, which holds trade liberalisation and the investment interests of corporations above fundamental human rights and development objectives, such as the right to health, is simply a disservice to humanity. Otherwise, how would one explain an international trade regime that has refused to suspend the monopoly conferred upon a few pharmaceuticals in relation to the production of the Covid-19 vaccines, even when it is apparent that the few intellectual property right holders lack the capability to produce an amount that could serve the world? A proposal put forward by South Africa and India to exempt WTO Members from the enforcement of some patents, trade secrets or pharmaceutical monopolies in order to facilitate the mass production of generic versions of the vaccines was sternly opposed by the European Union, United States, United Kingdom, and Brazil. This is particularly bewildering as there are not sufficient quantities of vaccines to go around in

[14] For the continuous relevance of the dependency theory, see BN Ghosh, *Dependency Theory Revisited* (Routledge 2019).

even those wealthier countries, let alone the poorest ones.[15] In reacting to this situation, the Director-General of the World Health Organisation expressed that "the world is on the brink of a catastrophic moral failure, and the price of this failure will be paid with lives and livelihoods in the world's poorest countries".[16] This proves that not even a global pandemic that has ravaged, and is still wreaking havoc on, millions of lives can justify the temporary restriction (not termination) of the commercial interests of corporations in favour of saving humanity. This can also be argued in the context of other trade agreements and their inequitable implications on various human rights and sustainable development objectives. Indeed, this is a fundamental global ethical predicament that requires a critical and pragmatic normative remedy.

Given the above justifications for this research, the approach and contributions of this thesis to the debates on global justice and the IEO can be divided into two broad segments. The first part combines theoretical and normative approaches in establishing five key conceptual principles that, in the opinion of this thesis, should be considered as the first principles or primary guiding norms for policymaking and adjudication in the global economic arena. The conceptual principles are distilled from the theoretical principles of Distributive Justice, the Right to Development, and TWAIL.

Distributive justice earned its relevance in this context because it remains the main political theory that is dedicated to the equitable allotment of goods, duties and privileges, in consonance with the merits or peculiarities of individuals, entities or states, and in the best interest of the wider society. Specifically, this thesis focuses on the theory as developed by John Rawls, in which he formulated two broad principles that he named "justice as fairness".[17] Of particular interest in Justice as Fairness is the "difference principle" (the last part of the second principle), which is a philosophical tool to justify inequality or differential treatment so long as it exists to serve the development or welfare benefits of the least advantaged in the scheme of the distribution of economic benefits. Even though Rawls limits the applicability of the difference principle to domestic governance, this

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[15] Achal Prabhala, Arjun Jayadev and Dean Baker, 'Opinion | Want Vaccines Fast? Suspend Intellectual Property Rights' *The New York Times* (7 December 2020).

[16] 'WHO Director-General's Opening Remarks at 148th Session of the Executive Board' <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-148th-session-of-the-executive-board> accessed 30 April 2021.

[17] See Sections 3.3.3 and 3.3.4 for explanation of Rawls's theory of justice as fairness.

thesis, nonetheless, argues in favour of its relevance in the context of global economic governance.[18]

Furthermore, this research adopts the Right to Development as its second lens because it strongly inclines towards the idea of approaching development as an inalienable fundamental human right that requires the necessary cooperation of all subjects of international law. Resurrecting the discussion on a human rights approach towards ensuring global cooperation for development objectives also strengthens the existing arguments of moral philosophers on the subject, as human rights justifications are gradually replacing moral persuasions on various subject matters in the present world, at least at the political level. This thesis also explores legal arguments on the legal status of the right to development including whether it could be considered to have attained the level of customary international law, or perhaps *jus cogens*. It must be emphasised here that the understanding of the right to development in the context of this thesis is not exclusive to the text of the United Nations Declaration on the Right to Development (UNDRD).[19] While the UNDRD is undeniably a major source, the idea of the right to development predates the Declaration and it can be found across different sources, which are analysed in this thesis.

Lastly, TWAIL, which is a branch of critical international legal scholarship, is a vital approach to critique the injustices in the IEO because it adopts deconstructionism and historical methods in challenging the Eurocentric pedagogy which attributes universality, neutrality, objectivity, and fairness to the international legal order. It presents an alternative viewpoint on the international legal order from the perspective of most countries of the Global South (so-called Third World); an order which is understood to have been founded and flourished upon colonialism and the subjugation of both the peoples and resources of nations of the Global South for the pleasure and interests of colonial empires. TWAIL scholars argue that the colonial foundation of international law still largely has an enduring effect in today's relationship between states – and it is perhaps more observable in international economic law.[20]

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[18] This position has also been differently expressed by some authors. See for examples: Garcia, *Global Justice and International Economic Law* (n 8); Allen Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World' (2000) 110 Ethics 697.
[19] United Nations General Assembly, Resolution 41/128 (1986).
[20] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 Third World Quarterly 739.

A combination of these three approaches (i.e., distributive justice, right to development, and TWAIL), therefore, serves as the basis for the five conceptual principles that this thesis proposes as essential for the realisation of fairness in the global economic governance. The adoption of multiple methodologies in addressing the question of justice in the IEO was inspired by Sen who argued that insisting on a single approach to justice, while disregarding other competing methods in total, "may be a mistake".[21] While there could be some slight conflicts in the three methods, adopting methodological pluralism in addressing an issue such as global economic justice, could help to cover multiple perspectives that cannot be exhausted through a single lens.

The second segment of this thesis's contribution to the discourse on global economic justice is a critique of the international trade subsidies regime, particularly the Agreement on Subsidies and Countervailing Measures (SCM Agreement), through the normative viewpoint of the five conceptual principles developed in the first segment of this thesis. The normative critique of the SCM Agreement serves as an opportunity to demonstrate how the conceptual principles can be operationalised in the context of international trade law.

There are several reasons for selecting the SCM Agreement as the case study of this thesis. The foremost reason is due to the numerous controversies that the subsidies regime has generated in the international trade arena and the centrality of subsidy policies to the industrial and welfare development objectives of less-industrialised countries. This thesis premises its argument for the amendment of the SCM Agreement on the infant industry economic theory, which justifies governments' interventions (such as export promotion and import substitution) and the protection of domestic industries from international competitors until they become mature, stable, and are able to compete in the global marketplace.

Relying on the five conceptual principles from the first segment, proposals are thereafter provided for the improvement of the SCM Agreement in order to be more equitable and development compliant. Such proposals include the introduction of a special category of subsidy to be known as the "Non-Actionable Development Subsidies" (NADS), which generally aims to shield (or limit in some cases) the usage of certain development-centred subsidies that satisfy defined criteria from potential countervailing actions. Beyond NADS, the thesis also explores how the aforementioned

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[21] Amartya Sen, *The Idea of Justice* (Belknap Press: An Imprint of Harvard University Press 2011) 10.

conceptual principles could be adopted and operationalised as the *grundnorm* of the international trade policy process and adjudication, through a proposed "development supremacy clause" (DSC). Also, some thoughts are offered on how the special and differential treatment provisions, which are the main WTO policy tool towards development concerns, could be improved and operationalised.

1.2. Structure of the Thesis and Summary of Chapters

This thesis is divided into five chapters. Chapter one provides a general introduction to the thesis by offering an insight into the nature, justification, core arguments, theoretical approaches, methodology, and structure of the thesis. It also defines the meaning of some key terminologies used in the thesis.

Chapter two adopts a combination of historical, economic, and legal approaches in establishing the inequitable nature of the IEO. Particularly, section 2.2 provides a non-Eurocentric alternative view to the background of the modern economic globalisation from antiquity to the colonial and Bretton wood eras. With the aim of deconstructing the mainstream pedagogy that misrepresents economic globalisation as a post-war phenomenon, the section establishes a link between the various historical periods and how colonialism is central to the present global economic order. This historical section will also strengthen TWAIL's perspective on the biased and unjust nature of the IEO. Chapter two, in section 2.3, further adopts the dependency economic theory, in explaining the effect of the IEO on the development goals of the Global South. The theory generally argues that the global economic structure is shaped by certain histories, which favours some countries to the detriment of others, thereby limiting the latter's development possibilities.[22] Beyond the historical and economic analysis, the chapter further demonstrates the claimed inequity by critically analysing some of the displeasures of developing countries in three different WTO agreements (i.e., the Agreement on Agriculture, the Agreement on Sanitary and Phytosanitary Measures, and the Dispute Settlement Understanding).

Having established the existence of an unjust IEO in chapter two, chapter three combines three theoretical approaches (the Right to Development, Distributive Justice, and TWAIL) in developing

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[22] Carol M Connell, 'Dependency Theory' in Charles Wankel, *Encyclopedia of Business in Today's World* (SAGE Publications, Inc 2009).

the five conceptual principles, which this thesis proposes to be mainstreamed and operationalised as the normative basis for international economic policies and adjudication, with the aim of achieving global economic fairness.

Chapter four thereafter adopts the five conceptual principles proposed in chapter three to offer a normative critique and proposals to improve aspects of the WTO Agreement on Subsidies and Countervailing Measures. The chapter provides the economic rationale for the use of subsidies, the legal background of the subsidies regime in the WTO law, a normative critique of the prohibited subsidies within the Agreement, and an analysis of the effect of the prohibition on the policy space of less-industrialised countries to implement crucial industrial development strategies. The chapter also analyses the ineffectiveness of the special and differential treatment (SDT) provisions enshrined in Article 27 of the Agreement, which aims to address the development concerns of developing countries. Finally, chapter five offers the general conclusion and final recommendations that are relevant to WTO agreements in general, and not exclusive to the SCM Agreement.

1.3. Methodologies and Approaches

The multidisciplinary nature of this research demands the adoption of multiple methodologies and approaches. The main approaches are discussed below.

1.3.1. Black-Letterism

Also referred to as the doctrinal legal approach, this methodology is the usual commencement point of most, if not all, legal academic analysis. It is the standard positivist methodology that focuses on the position of the law as it is through the analysis of authoritative legal texts that are intrinsic to the discipline of law.[23] This methodology is relevant in the context of this thesis for the explanation and understanding of the current state of the international economic legal regime and other associated legal analysis, through the combination of primary and secondary legal sources. Examples of legal sources that are prevalent throughout this research include international law instruments such as the various trade agreements of the WTO, the Vienna Convention on the Law of Treaties, and human rights declarations; judicial and quasi-judicial interpretations such as

[23] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 9.

rulings emanating from the WTO's dispute settlement bodies; national legislation and case law; and numerous scholarly materials.

1.3.2. Theoretical and Normative Approaches

This thesis strongly opines that a mere doctrinal analysis of the current state of the law is inadequate to provide any reasonable and pragmatic solution to the unfair status quo. Therefore, theories are particularly fundamental to this research. For instance, it adopts a developed version of Rawls's distributive justice, which is a political theory, to explain how fairness and global justice should be understood in the context of international economic law. In addition, it also relied on the right to development and TWAIL in both understanding the unfairness of the IEO and distilling conceptual principles which are thereafter applied as normative values to critique the Agreement on Subsidies and Countervailing Measures as well as offer proposals for the amendment of the law.

Aside from political theories, economic theories, such as the infant industry theory and the dependency theory, serve as the basis to justify the economic and development positions adopted by this research. They also largely influence the choice of normative proposals offered with regards to the discussion in chapter four.

1.3.3. Critical International Legal Methodology

Even though critical international legal methods also serve as a theoretical basis, their objectives transcend just theories.[24] They are also scholarly movements that combine multiple theories and methodologies in advancing their central claim that international law is largely an instrument of maintaining the status quo of an unjust global power structure and a codified form of various biases against marginalised nations. This thesis adopts TWAIL as its critical theory as well as methodology in critiquing the IEO from the perspective of the nations and peoples that are at the receiving end of the prevailing neo-colonial order. Through its espousal of deconstructionism, the Third World critical method challenges the prevailing international legal reasoning and pedagogy that pretends to afford neutral and objective treatment of claims while safeguarding structures of unfair political and economic power from fundamental re-examination and historical method.

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[24] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 International Community Law Review 371.

TWAIL also significantly relies on the historical legal approach to disentangle the development of legal principles, philosophies, the conscience of the communities underlying the law, the political, social, and economic structures which produced the law, and international relations (i.e., colonialism), which shaped the law at the international levels. Thus, different sections of this thesis provide historical backgrounds of concepts for a proper contextual understanding.

1.3.4. Socio-Legal Methodology

While the use of theories and critical methods in legal analysis can be vaguely classified under the socio-legal methodology, it is key to specifically emphasise its adoption in this thesis as various social analytical tools beyond the approaches mentioned in sections 1.3.2 and 1.3.3 above are also adopted in this research. Socio-Legal research methodology is generally understood as the study of legal concepts, practices and institutions in their social and historical contexts.[25] It typically rely on empirical studies, rather than purely doctrinal examination, and it is often interdisciplinary. The methodology's main objective is to understand the law in the context of its relationship to an ever-changing society. Persuasive tools such as statistics, political arguments, history, and existing empirical findings are employed to understand the state of art and offer proposals to the IEO in this thesis.

1.4. Definition of Selected Terminology

The purpose of this section is to define what this research intends by the usage of key terminology that is used in this thesis. This section defines, development, less-industrialised countries, and global justice/fairness.

1.4.1. Development

The term development is used in multiple sections of this thesis, and its multidimensional and complex nature is sometimes used to contest normative arguments against its mainstreaming into international economic and trade policies. As described by development economists such as Janvry and Sadoulet, development can be generally understood as the enhancement of human wellbeing.[26] The concept of wellbeing itself is also multidimensional and context-specific depending on

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[25] See generally, Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Bloomsbury Publishing 2005).
[26] Alain de Janvry and Elisabeth Sadoulet, *Development Economics: Theory and Practice* (Routledge 2015) 30.

priorities and trade-offs in various jurisdictions. While to some policymakers, achieving a rapid rate of economic growth is their main development objective, other policymakers can prioritise other factors such as the importance of maintaining low inequality, reduction of poverty, and access to basic needs (such as health, food, education, and pension services) for all. While the debates surrounding the meaning of development often reflect social biases and ideological subjectivities, a reasonable starting point towards understanding the concept is through the set of 17 objectives defined by the United Nations, known as the Sustainable Development Goals (SDGs).[27] The SDGs can be broadly divided into four dimensions, i.e., economic, social, cultural, and environmental. With a total of 169 targets, the 17 SDG goals focus on specific issues, such as poverty; food security; good health and wellbeing; quality education; promotion of industrialisation; innovation and infrastructure; gender equality; water and sanitation; reduction of inequality; climate action; employment and economic growth; among others. While the concept of development across the world is inevitably wider than the 17 specific dimensions, they nonetheless help reveal a broad international consensus on some fundamental components of development.

From a conceptual perspective, Sen's *Development as Freedom* presents a dialectical relationship between freedom and development,[28] in which development is viewed as "an integrated process of expansion of substantive freedoms that connect with one another".[29] He sees freedom as both the main end and the principal means of development. Some of the freedoms, according to Sen, include freedom of opportunity, economic protection from poverty, access to health care, and political freedom – and each freedom encourages the development of another. Of particular relevance to this thesis is Sen's idea that development entails the removal of "unfreedoms", which are essentially social, economic and political factors that may impede the achievement of freedoms. For instance, poverty could be characterised by the lack of freedom to exercise economic choices and protection. He also called into question various unfreedoms facilitated by the neo-liberal development models, advanced by the IEIs, by demonstrating their need to enable people to develop their abilities to be free from the scourges of poverty, inequality and repression. In

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[27] United Nations General Assembly, *Resolution 70/1. Transforming Our World: The 2030 Agenda for Sustainable Development* (2015), A/RES/70/1.
[28] Amartya Sen, *Development as Freedom* (Reprint edition, Anchor 2000).
[29] ibid 8.

applying this understanding of development to international trade, particularly the discussion on subsidies, it would mean that a development-consistent trade agreement would have to remove obstacles experienced by less-industrialised jurisdictions in order to increase their capacities to implement policies that could help them develop their infant industries.

In addition to the above understandings of development, this thesis also understands the various development objectives, principles and indicators as fundamental human rights in accordance with the various human rights instruments acclaiming the concept as such, such as the United Nations Declaration on the Right to Development and the African Charter on Human and Peoples' Rights.[30]

1.4.2. Less-Industrialised Countries

The term less-industrialised country is mostly used in this thesis to distinguish between the industrialised developing countries (usually referred to as 'Newly Industrialised Countries' (NICs)) and other developing and least-developed countries. The NICs are understood as countries whose economies have transitioned from being primarily agricultural-centred into a more industrialised goods producing economy, such as manufacturing, construction, and mining.[31] NICs are also more competitive in the global trade market and have a higher standard of living than most developing countries. Such countries include Argentina, Brazil, China, Russia, and Turkey. As such, this thesis opines that it might be inconsistent with an objective development evaluation to consider the NICs within the same policy context as most developing countries whose economic realities are incomparable. However, it must be emphasised that the usage of the term "developing countries" in this thesis includes all members of the category.

1.4.3. Global Economic "Justice" and "Fairness"

The terms "global justice" and "fairness" are sometimes used interchangeably in this thesis. However, while global justice, on the one hand, specifically refers to the theory of "global distributive justice" which is discussed in chapter three, global economic fairness, on the other hand, refers to the realisation of the five conceptual principles distilled from the combination of

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[30] Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.
[31] 'Newly Industrialized Country | Economics' (*Encyclopaedia Britannica*)

the principles of global distributive justice, the right to development and TWAIL, which are proposed in section 3.5 of this thesis.

CHAPTER TWO

2.0. ECONOMIC GLOBALISATION AND INTERNATIONAL ECONOMIC ORDER: EVOLUTION, COMPLAINTS AND EFFECTS

2.1. Introduction

The term globalisation has ignited increasing debates among researchers, policymakers and the global populace from many centuries ago to the present. Unquestionably, the controversies came into existence due to the increasing irrelevance of territorial boundaries among nations and even continents in terms of cultures, ideas, politics, and economic activities. The varied impact of globalisation across the world is also a major contributor to the rise of the global debate, and it has led to the existence of rival ideological schools under the banner of pro-globalisation and anti-globalisation advocates. However, a third movement also exists that agrees with the inevitability of the phenomenon, but advocates a fundamental modification to its structure and practices for the equitable benefit of the larger world. The overall objective of this chapter is to establish a convincing argument in favour of the notion that the IEO as it currently stands requires a theory of justice and a guiding human rights principle in order to ensure adequate fairness and equity in its operation. Therefore, the conclusion reached in this chapter will serve as the basis for the theoretical/legal approaches that will be examined in the succeeding chapters.

In Stiglitz's *Globalisation and Its Discontents*, globalisation was defined to mean "the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge, and (to a lesser extent) people across borders".[32] Globalisation is, therefore, the explanation for the existence of Asian cuisines in London, Hollywood productions dominating the entertainment space in Africa, the practice of Ifá in the Americas and the Canary Islands, political unrest in the Middle East affecting the global oil price and the exchange rates of international currencies. It is also the reason why Shell, Chevron, Mobil and Halliburton rank among the top players in the Nigerian corporate industry.

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[32] Stiglitz, *Globalization and Its Discontents* (n 1) 9.

While globalisation in its generic usage is broadly categorised into three main branches, which are political, cultural and economic globalisation,[33] this thesis is mainly concerned with the globalisation of economic activities which could be via international trade, investment, and finance. This is not to say that the various categories of globalisation are not closely knit. In fact, they are complementary to one another in most circumstances. In determining the relevance of concepts such as distributive justice, right to development and the TWAIL in relation to the present IEO and its legal framework, it becomes pertinent to dedicate a segment of this thesis to the explanation of some foundational issues.

In achieving the mentioned objective, this chapter looks into the evolution of economic globalisation from antiquity until the modern age, and critically examines the background of the major international economic institutions. It thereafter broadly examines the effect of the present IEO particularly from the perspective of the developing and least-developed nations, using the dependency theoretical approach of political economy. For the purpose of further establishing the asymmetric nature of the IEO, this chapter also discusses three key complaints of poorer countries regarding some aspects of the IEO, specifically relating to the WTO Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and the Dispute Settlement Understanding (DSU). This chapter adopts both historical and critical approaches due to the fact that the existing global economic structures emanated from a certain historical background, which needs to be laid out in order to appreciate the objective of the thesis in an appropriate context.

2.2. Evolution of Economic Globalisation and the International Economic Order

Even the history of economic globalisation is disputed, particularly regarding the accurate period to situate its origin. Even though some authors have restricted its origin to the economic developments in the modern age,[34] others have opined otherwise as will be demonstrated below. This thesis is also inclined toward favouring the position that regards economic globalisation as a phenomenon with an extended history. It is no coincidence that as early as the 2nd century BC, Polybius, the Greek historian of the Hellenistic period, was reported to have said: "Before, the

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[33] George Ritzer, 'Studying Globalization: Methodological Issues', *The Blackwell Companion to Globalization* (Blackwell Publishing Ltd 2008).
[34] Daniele Conversi, 'The Limits of Cultural Globalisation?' (2010) 1 Journal of Critical Globalisation Studies 36.

events that took place in the world were not linked. Now, they are all dependent on each other".[35] This points out that even though the reach and extent of globalisation in the antiquity may not be comparable to what is in existence today, the conception and gradual formation of a globalised political, cultural and economic world had gradually begun to play out since the ancient times.

In classifying the significant eras in the development of economic globalisation, Friedman divided the periods into three, which are the years 1492 to 1800, 1800 to 2000, and 2000 to the present moment. He termed those eras Globalisation 1.0, 2.0 and 3.0, respectively.[36] According to Friedman, the first era of globalisation commenced in 1492 when Cristopher Columbus set sail and inadvertently "discovered" the Americas and other territories which later came to be known by Europeans as the "New World". This supposed discovery opened trade between the Old World (Africa, Asia, and Europe) and the New World. The developments from then until 1800 "shrank the world from a size large to a size medium".[37]

The expansion of multinational corporations and the industrial revolutions were the dynamic forces that drove globalisation in Friedman's era 2.0, which lasted until the year 2000. This was despite the interruption of the First and Second World Wars and the Great Depression. Unlike the first and second eras of globalisation in which states and multinational corporations respectively were the main actors, Friedman states that globalisation 3.0 is centred around people across the globe with the ability to individually compete against each other. This third era which, according to him, started around 2000 is "shrinking the world from a size small to a size tiny [in terms of economic integration] and flattening the playing field at the same time".[38] Still, he concludes that "the world is not flat" yet.[39]

There are arguably a number of gaps in Friedman's classification of the major eras of globalisation. His choice of situating the commencement of economic globalisation at Colombus's "discovery" of the Americas, perhaps, reveals that the author's historical view was too centred in the activities surrounding the Western world. His classification also left out significant events that occurred in

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[35] Cited in Jean-Yves Huwart and Loïc Verdier, *Economic Globalisation: Origins and Consequences* (OECD 2013) 20.
[36] Thomas L Friedman, *The World Is Flat: A Brief History of the Twenty-First Century* (1st edn, Farrar, Straus and Giroux 2005) 9–11.
[37] ibid 9.
[38] ibid 10.
[39] ibid 375.

other continents, and the collective participation of the other worlds in the development of what led to today's global economic order. This thesis will discuss some of the stated historical gaps, by adopting a historical classification based on specific events and relating back to the ancient times.

2.2.1. Antique Globalisation

The earlier statement credited to Polybius as far back as the 2nd century BC[40] alludes to the gradual formation of a globalised economy since antiquity. This era, which can also be referred to as ancient or archaic globalisation, generally covers the economic events and developments from the earliest recorded civilisations until roughly the late 15th century.

Trade activities in this age were divided according to geographical locations with each city having its own trading centre. These centres served as the exchange point and "break in bulk" for goods destined for markets that were more distant.[41] The acceleration of globalisation in this era was nothing in comparison to what is in vogue today due to less advanced technology to aid transportation, production, and communication.

Nonetheless, the era also had inventions that aided its development. The most significant inventions that facilitated economic advancement and integration in this phase of globalisation were writing, shipping, and the wheel.[42] The invention of writing in the 4th century BC was crucial to write legal contracts as well as record harvests and livestock. The wheel, which was also invented around the same period in Mesopotamia, assisted by increasing the volume of goods that could be transported over long distances, instead of relying on just animals such as horses and camels with lesser capacity.[43] Shipping, on the other hand, gave the biggest improvement to international trade, and still transports the largest amounts of freight today.

The great empires controlled the world trade in this phase by politically unifying disparate territories for the undisturbed movement of merchants and their goods across continents. By the 6th to 4th century BC, the Persian Empire had established trading routes for the movement of

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[40] Huwart and Verdier (n 35).
[41] Janet L Abu-Lughod, *Before European Hegemony: The World System A.D. 1250-1350* (Oxford University Press 1989) 33.
[42] Huwart and Verdier (n 35) 21.
[43] ibid.

merchants, which spread from the Mediterranean to the River Ganges with the participation of diverse people and civilisations. Alexander the Great's Macedonian Empire, after taking over from the Persians in 330 BC, thereafter successfully linked the East to the West.[44] This period witnessed immense cultural integration and transfer of trading skills, such as the use of currency. The city-states also took benefit of the expanded borders to participate heavily in mostly maritime trade.

The Romans, heirs to the Greeks, from the 5th century BC to the 5th century AD, also expanded international trade across a vast geographical area, from Scotland to Egypt and Spain to Asia Minor. The development of globalisation in this era was so tremendous to the extent that some have chosen the Roman Empire as the actual origin of globalisation. As carefully depicted by Lionel Casson, people's lifestyle in this era actually reflected the integration of diverse cultures. He said:

> The Roman man in the street ate bread baked with wheat grown in North Africa or Egypt, and fish that had been caught and dried near Gibraltar. He cooked with North African oil in pots and pans of copper mined in Spain, ate off dishes fired in French kilns, drank wine from Spain or France … The Roman of wealth dressed in garments of wool from Miletus or linen from Egypt; his wife wore silks from China, adorned herself with diamonds and pearls from India, and made up with cosmetics from South Arabia … He lived in a house whose walls were covered with coloured marble veneer quarried in Asia Minor; his furniture was of Indian ebony or teak inlaid with African ivory …[45]

The Islamic expansionism, which began in Arabia around the 7th century, also promoted the economic interdependence of geographically distant individuals from the Middle East to sub-Saharan Africa. This expansionism, which mainly occurred in the period some historians refer to as the "Islamic golden age" entailed the rise and fall of different considerably imperial empires (such as the Abbasids, Fatimids, Almoravids, Moguls, the most recent Ottomans et al.) for many centuries. Extensive intercontinental trade networks were established which extended from the

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[44] Edward Anson, *Alexander the Great: Themes and Issues* (Bloomsbury Academic; an imprint of Bloomsbury Publishing Plc 2013) 153.
[45] Lionel Casson, *The Ancient Mariners: Seafarers and Sea Fighters of the Mediterranean in Ancient Times* (Princeton University Press 1991) 198–199.

Mediterranean to the Atlantic Ocean in the west, the Indian Ocean and the South China Sea in the east, and including most of the Old World.[46] The network also included substantial areas of Asia, Africa, and Europe.[47] The silver dirham currency was largely circulated across the Afro-Eurasian regions, including sub-Saharan Africa and northern Europe, mostly for the exchange of goods and slaves.[48]

From the above-mentioned examples of economic and cultural integrations of diverse people from different continents and at various periods of this ancient era, and the mainstream description of globalisation which basically is the interconnectedness between regions and individuals, it can, therefore, be inferred that globalisation is a concept that has been in existence since antiquity.

Being a work in progress, the mode and practice of globalisation will undeniably vary from one era to another. It is also instructive to note that no world system (economic inclusive), even until today, has ever been actually global in the strict sense that it guarantees all parts of the world a levelled participation among one another. Otherwise, there would be no need for multiple works dedicated to the yearnings of the Third Worlds or the larger parts of the world who feel disenfranchised in the modern IEO. As Hopkins rightly pens: "Today, as in the past, globalization remains an incomplete process: it promotes fragmentation as well as uniformity; it may recede as well as advance; its geographical scope may exhibit a strong regional bias …"[49]

It has been posited that globalisation in an earlier age always influences the subsequent age. Thus, there are links between the modern IEO and the established structures in the ancient era, particularly the latter part. In Frank's *ReOrient: Global Economy in the Asian Age*,[50] the author who is a radical proponent of an extended historical origin of economic globalisation argued contrary to the opinion expressed in the works of some economic historians and social theorists whereby they held that the origin of the world economy only commenced around the 15th century.

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[46] John M Hobson, *The Eastern Origins of Western Civilization* (Cambridge University Press 2004) 29–30.
[47] Subhi Y Labib, 'Capitalism in Medieval Islam' (1969) 29 The Journal of Economic History 79.
[48] Roman K Kovalev and Alexis C Kaelin, 'Circulation of Arab Silver in Medieval Afro-Eurasia: Preliminary Observations' (2007) 5 History Compass 560.
[49] AG Hopkins, *Globalization in World History*, vol 494.;494; (Pimlico 2002) 3.
[50] Andre Gunder Frank, *ReOrient: Global Economy in the Asian Age* (1st edn, University of California Press 1998).

He embraces the opposing view that the present world order actually has its roots in a peculiar Afro-Eurasiatic structure extending back for millennia.[51]

Prior to Frank's work, Janet Abu-Lughod's ground-breaking book titled *Before European Hegemony: The World System A.D. 1250-1350*[52] argued against the prevailing Eurocentric narrative in the works of Henri Pirenne, Max Weber and similar leading social theorists who had presented a hierarchically dichotomous historical account of a superior (occidental) as opposed to inferior (oriental) cities in the ancient era. Abu-Lughod noted that the prevailing narrative "tend[s] to treat the [modern] European dominated world system that formed in the long sixteenth century as if it had appeared de novo"[53] without the influence of a pre-existing world economic structure.[54] She argued that the view that generalises the existence of a period known as "dark ages" in the world's history was ill-conceived because "if the lights went out in Europe, [in the era preceding the rise of the West] they were certainly still shining brightly in the Middle East".[55]

She established that, prior to the 15th/16th century that was inaccurately adopted by the aforementioned scholars and their ilk as the starting point of the history of economic globalisation, there was already an existing Afro-Eurasiatic world system of international trade in place in the 13th century. This world system comprised of eight interlinked city-centred regions in three connected and interlocked sub-systems. Abu-Lughods's world-system consisted of: (1) the European subsystem, which comprised the Champagne fairs, industrial cities of Flanders, and the merchant mariners of the Genoa and Venice regions; (2) The Mideast heartland and its three routes to the east across Baghdad/Persian Gulf, Cairo, and the Mongol Asia; (3) and the Indian Ocean subsystem, which included India, Southeast Asia, and the silk route to China.[56]

What was principally important to her was to establish the link between the modern Western-dominated world system and the previous Afro-Eurasian system, and explicate how Europe joined and continued that previous system. She maintained that if the Moguls had not supported the trans-Asian caravan trading in the 13th century and onwards, the networks that enabled Europe's

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[51] ibid 52.
[52] Abu-Lughod (n 41).
[53] ibid x.
[54] ibid 361.
[55] ibid ix.
[56] Abu-Lughod (n 41).

incorporation into the larger space of the Eurasian commerce would not have existed. Even more, some of the technologies that made the European exploration and expansion possible were inventions from the East, from that earlier Asian dominated world system. However, Abu Lughod made it clear that the Asian-centred world system degraded due to its specific internal situations, and not due to the rise of the West.

Even though Abu Lughod's work is a major influence on the emergence and consolidation of post-Eurocentric perspectives on global history, which is radically influencing the reinterpretation of the origins of the world's development,[57] a work of such an ambitious scope cannot be without some gaps. As noted by Gills, Abu-Lughod omitted to include the West African-trans-Saharan-Mediterranean circuit from her list of interlinked regions, even though this commercial link played an important part in the development of the medieval West African cities.[58]

2.2.2. 15th Century – 18th Century

This was the era immediately following the archaic globalisation, and it was the starting point for the rise of the maritime European empires. This period, which is also known as the "Renaissance", because it was characterised by the revival of learning and culture in Europe, saw significant technological developments and the expansion of "trade" across all continents.[59] Although in the context of the origin of economic globalisation as opposed to general history, some historians prefer to categorise this period as "proto-globalisation".[60]

The intellectual inquisitiveness that characterised this period fostered technological inventions and the discovery of new production methods, such as using cotton to make clothes. Proto-globalisation also involved increased interaction between Western Europe and the existing Afro-Eurasian global system. The developments in transportation (larger ships and fleets) and the improvement of navigation techniques (such as the compass) led to a significant turning point, at least from the European viewpoint – the so-called "great discovery" of the "New World" through the adventures of Christopher Columbus and Vasco de Gama (among others).

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[57] Barry K Gills, 'Janet Abu-Lughod and the World System: The History of World System Development and the Development of World System History' (2014) 20 Journal of World - Systems Research 174, 174.
[58] ibid 178–179.
[59] Huwart and Verdier (n 35) 23–24.
[60] Hopkins (n 49) 3.

The rise of trade in slaves as a new commodity, which was primarily coordinated by the European colonial empires, was also a major characteristic of this period – if not the most influential to the colonial economies.[61] The Atlantic slave trade thrived due to the need for mass production by the Europeans who found it less costly to import crops and goods rather than do the production themselves. It began with the Portuguese and Spanish empires in the 15th and 16th centuries, followed by the French and British empires in the 17th century. The Dutch, German and Swedish also participated, albeit to a much lesser degree in comparison with others. The establishment of those colonial empires and recourse to slavery stimulated improved production quantity and the movement of goods and people across continents.

One major feature of globalisation in this era was the establishment of the so-called "triangular trade" that lasted mainly from the 16th century until the 19th century.[62] It involved Europeans sailing to the West African coast to barter manufactured goods for slaves who were thereafter transferred to the east coast of North America for labour. Products such as sugar, tobacco and cotton would then be sent back to Europe from America, which would then be used to trade with Asian nations for goods such as spices, tea, and cloth.

It is also worth mentioning that this period saw the emergence of the active involvement of private companies in global trade. Companies like the British East India Company (1600) and the Dutch East India Company (1602) are often referred to as the first multinational corporations in the world.

Notwithstanding the mass production and considerable technical advancements, this period also witnessed the dominance of "mercantilism". This is a school of thought in the international political economy whereby states jealously defend their trading boundaries by applying protectionist barriers to hinder the free flow of goods. The prevalence of this doctrine – which was inspired by the idea that the amount of wealth in the world was limited and a state must block the economic interests of another to secure its own – spanned from the 15th century until the technological progression of the industrial revolutions and the subsequent rise of economic liberalism (a counter-theory) centuries afterwards.[63]

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[61] ibid 5.
[62] JE Merritt, 'The Triangular Trade' (1960) 3 Business History 1.
[63] Robert O'Brien and Marc Williams, *Global Political Economy: Evolution and Dynamics* (Palgrave Macmillan 2016) 8.

2.2.3. Late 18th Century – 1945

This period in the evolution of economic globalisation was characterised by the industrial revolution, British hegemony, prominence of economic liberalism and its later destruction, renewed imperialism on a larger scale and the two world wars among others.

The rise of learning culture in Europe, as mentioned in the section above, and the desperate need to compete with other trading competitors in production led to the first industrial revolution that began in Britain in the late 18th century and continued until the 1870s. The first phase of the industrial revolution was the profusion of new technologies and the application of machinery to production, especially in textile manufacturing. The quantity of production accelerated with the aid of the new discoveries, and the British were able to overtake their Indian and Dutch rivals in the production of textiles in terms of competitive advantage. In fact, India's textile economy collapsed by the 1840s because of the British's massive production.[64]

The second phase of the industrial revolution saw the emergence of the steam era and new methods of transportation. Rail transportation and ships tremendously improved in terms of size and speed due to the developments in iron and coal power. New trading routes were also constructed, such as the Suez Canal and Panama Canal for the smooth transportation of people and goods. Although, construction of the former led to the bankruptcy of Egypt and their virtual rule from Britain.[65]

With the advancement in technology and growth in international relations, this period also marked the blossoming of the liberal ideologies, which generally favours a peculiar progressive way of organising social, political and economic life in a state. In relation to the international economy, it theoretically advocated the ability of persons and corporations to engage freely in economic activities with limited state interference. It essentially promotes free competition and a self-regulating economic environment.

The British positioned themselves as the main promoters of this ideology, with the famous Scottish economist, Adam Smith, being known as the expounder of the doctrine of "*laissez-faire, laissez-passer*" translating from French to mean "let it be, let it pass".[66] It refers to permitting goods to

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[64] ibid 65.
[65] ibid.
[66] Jacob Viner, 'The Intellectual History of Laissez Faire' (1960) 3 Journal of Law & Economics 45.

pass borders without any hindrance, such as the various tariff and non-tariff barriers. The liberal theory of comparative advantage, which basically is the ability of a person, business or nation to produce a specific good at a lower opportunity cost than its competitor, was also articulated in the British parliament by David Ricardo to make an intellectual case for free trade.[67]

Governments in support of free trade, particularly championed by the British, backed this ideology by eliminating or reducing existing protectionist measures. For example, the British Parliament repealed the Corn Law, which had earlier protected the aristocrats against competition from foreign cereal producers since 1815.[68] This greatly improved international trade to the extent that the global trade volume grew sevenfold between 1840 and 1913.[69] The era also saw the increase of bilateral custom treaties across Europe for the elimination or reduction of import tariffs.

It is important to note that multilateralism was still not in question at this stage of globalisation, and the acceptability of the liberal doctrine was relatively mixed because states like the US and Germany strengthened their protectionist policies, especially after the Second Industrial Revolution, which was largely favourable to the duo.

Other ideologies also emerged with varying agendas such as Marxism led by Karl Marx who was embittered with the prevailing capitalist exploitation of the labourers and envisioned a new societal structure (communism) that would favour collectivism in ownership of production and sought to equally distribute the wealth derived from people's labour.[70] This ideology continues to influence the political economy of some states (such as China and Cuba) even in the 21st century.

The industrial revolution that led to an unprecedented economic growth was immediately followed by an unparalleled renewal of imperial expansion. Although, colonialism and slavery by European imperialists began in the 1400s with their main focus on the Americas and coastal parts of Africa. However, between 1879 and 1913, they had expanded their empires into the interiors of Africa and Asia, covering over one-sixth of the planet.[71] The imperial expansionism in Africa, which was

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[67] John M Letiche, 'Adam Smith and David Ricardo on Economic Growth' (1960) 1 The Punjab University Economist 7.
[68] Huwart and Verdier (n 35) 27.
[69] ibid 29.
[70] O'Brien and Williams (n 63) 67–68.
[71] David B Abernethy, *The Dynamics of Global Dominance: European Overseas Empires, 1415-1980* (Yale University Press 2000) 81.

termed the "scramble for Africa" spanned approximately 35 years with the entire continent (except Ethiopia) being under colonial subjugation. Mass wealth was accumulated through the exploitation of both human and natural resources on the continent. For example, King Leopold of Belgium established his private empire in Congo, and not less than ten million Africans lost their lives in the effort to harvest rubber for export.[72] Another example is Cecil Rhodes whose aim to accumulate vast wealth led him to subjugate the people of Ndebele and created a new country named after him (Rhodesia – modern-day Zimbabwe). His legacy is preserved till today via the establishment of the Rhodes Scholarship at Oxford University.[73]

The liberal and imperialist global economic order that dominated the 19th century came to an end with the First World War starting in 1914. The war disordered the existing pattern of international trade and finance and positioned the United States, which was the least affected Western country by the war, as the largest exporter of agricultural products in the world. The inter-war period saw the re-domination of protectionism, with countries increasing their customs duties in order to shield themselves from international competition. For example, Belgium and Italy raised their tariffs from 9% to 15% and 18% to 22% respectively.[74] By 1925, the average tariff for manufactured products in the United States was raised to 37% and even went further up in 1930 upon the passage of the Smooth Hawley law.[75] Trading allies also hit back by adopting various protectionist measures.

Prior to the commencement of the Second World War in 1939, international trade was starting to gain its lost ground before the war struck again. The devastating economic situation at the end of this era was directly responsible for the measures that led to the growth of multilateralism, which went hand in hand with the escalation of multinational corporations that became the major players in the post-1945 or modern IEO, which is examined in the next sub-chapter.

2.2.4. Modern Economic Globalisation and the International Economic Institutions

[72] O'Brien and Williams (n 63) 73.
[73] Marybeth Gasman, 'Legacy: Cecil Rhodes, the Rhodes Trust and Rhodes Scholarships by Philip Ziegler' (2010) 50 History of Education Quarterly 261.
[74] Huwart and Verdier (n 35) 29.
[75] ibid.

Modern economic globalisation captures the economic developments from the post-World War II era until the present moment. Most of the events that occurred and the decisions that were made by the leaders of the industrialised world after the war are responsible for moulding the IEO of the present time. Some major characteristics of this period include the Cold War political and economic relationship, decolonisation, technological advancements that birthed the information revolution as well as the emerging fourth industrial revolution, advancement of neoliberal economic principles, and the proliferation of economic multilateralism through the Bretton Woods institutions and other regional economic bodies.

By the end of the two World Wars, the Cold War divisions and diverse competing political and economic philosophies marked international relations between 1945 and 1989. This political order led to the classification of the world's countries into three categories. The First World consisted of the United States of America and her allies in Western Europe, Japan, South Korea, Canada, Australia, New Zealand, and the United Kingdom. The Second World was another bloc that comprised the communist-socialist states of the Soviet Union and Eastern Europe, while the Third World was used to refer to the rest of the world's states that were not politically aligned to either of the blocs.

It is instructive to mention that the usage of some of these classifications is evolving from time to time and now vary from the initially intended political classification because the original concept is somewhat outdated and does not represent the political and economic reality of today's world states. For instance, scholars of the dependency theory like Andre Frank and Walter Rodney have consistently used the term "Third World" to refer to "periphery" countries that are dominated by "economic core" countries, according to the ideas canvassed in their theories of the world system.[76] Nonetheless, due to the fact that many Third World countries were poor and non-industrialised, the term became a stereotype to refer to the developing and poor nations. Thus, while some European countries like Switzerland, Sweden and Austria could be correctly classified as Third World nations because they were politically non-aligned during the Cold War, they are hardly referred to as such. On the other hand, some countries of the communist bloc such as Cuba are usually referred to as a Third World nation due to their economic status. However, there is no hard

[76] BR Tomlinson, 'What Was the Third World?' (2003) 38 Journal of Contemporary History 307.

and fast rule to the evolving usage of the term,[77] because newly industrialised nations like India, Brazil and China are still often referred to as Third World countries. Nonetheless, the scholars of the TWAIL – which will be a focal discussion in the next chapter of this thesis – have defined the term, within the context of their realm, to represent every marginalised country and group across the world. These groups could mean the poor countries or could even be marginalised peoples in the developed communities, such as Aborigines or natives, people of colour, women, and poverty-ridden cohorts in the community.[78] These classifications remain relevant to contemporary discussions on the global economy and inequality.

Beyond the Cold War and the economic/political classification of the countries of the world, the modern economic system, which was driven by the expansion of multinational corporations – mainly originating from the United States and Europe was considerably facilitated by the combined effect of technological improvements and series of multilateral agreements. The agreements were signed by mostly the leaders of the First World countries towards the end of the Second World War at the United Nations Monetary and Financial Conference held in Bretton Woods from July 1 to July 22, 1944. Essentially, the Bretton Woods agreements are the main pillars that shape the face of the modern economic globalisation because they form the framework for international finance and commerce, and led to the establishment of the major IEI.

The political basis for the agreements flows from the ideas that the Second World War had occurred due to the failure of the involved countries to deal with the economic problems after the first war, and that too much controlling power was concentrated in a small number of states. In articulating the objective of the agreements, Henry Morgenthau who was the Treasury Secretary to Franklin D. Roosevelt described them as: "Collective measures to safeguard world populations from threats to peace ... must not rest solely on an international system that manages disputes and prevents aggression, but also on economic co-operation among nations aiming to prevent and eliminate social and economic maladjustments."[79]

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[77] ibid.
[78] Kwadwo Appiagyei-Atua, 'Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review' (2015) 8 African Journal of Legal Studies; Chimni, 'Critical Theory and International Economic Law' (n 11).
[79] Huwart and Verdier (n 35) 34.

These series of agreements introduced a new monetary system in which currencies were pegged to the price of gold, while the United States dollar was linked to the price of gold as the reserve currency. The International Monetary Fund (IMF) was specifically created to lend the reserved currency to nations and "monitor" the exchange rates. Although, the global monetary liberalisation was still limited at this stage because the system did not make all currencies convertible among themselves. Nonetheless, it was a record harmonisation of monetary relationship. The outcome of the agreement also established the International Bank for Reconstruction and Development (IBRD), which today is part of the World Bank Group, for the purpose of administering economic reconstructions and regulations. Despite the active participation of the representatives of the Soviet Union, which was the main rival political and economic bloc in the negotiations, they, however, declined to ratify the agreement, resting on the claim that the institutions created were only "branches of the Wall Street".[80] Some of the reasons suggested by commentators for the Soviet Union's non-ratification of the agreement include the resolve of the United States that the Bretton Woods' monetary system should rest on both gold and the US Dollar and the allotment of the biggest decision-making quota to the US.

By the mid-1960s, the US post-war hegemony began to decline, and the European Economic Community (EEC) and Japan emerged as international economic powers in their own right. Dissatisfaction increased against the privileged role of the US dollar as the international currency. Eventually, the monetary system collapsed between 1968 and 1973 when monetary imbalances threatened the US economy, particularly when US President Richard Nixon declared the "temporary" suspension of the US Dollar's convertibility into gold in 1971.[81] Before this, the US Dollar had struggled throughout the 1960s within the standard adopted at Bretton Woods; this marked the collapse of the monetary system. Subsequent attempts made to restore the fixed exchange rates were unsuccessful.

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[80] Edward Sagendorph Mason and Robert E Asher, *The World Bank since Bretton Woods: The Origins, Policies, Operations, and Impact of the International Bank for Reconstruction and Development and Other Members of the World Bank Group: The International Finance Corporation, the International Development Association, the International Centre for Settlement of Investment Disputes* (Brookings Institution 1973) 29.

[81] 'About the IMF: History: The End of the Bretton Woods System (1972–81)' <https://www.imf.org/external/about/histend.htm> accessed 30 April 2021.

Ever since the collapse of the Bretton Woods monetary system, member states of the IMF freely choose any form of currency exchange arrangement they desire (with the exception of pegging their currency to gold) such as: letting the currency float freely, domesticating the currency of another country, pegging it to another currency or set of currencies, agreeing with one or more countries to form a currency bloc, or forming part of a monetary union. This change in the system is synonymous with increased globalisation and liberalisation of capital, especially from the 1970s – 1980s when the UK, Western Europe, Japan and Scandinavia opened their borders to capital flows, and the US also did away with the controls of inward and outward capital flow. This monetary liberalisation increased the internationalisation of the financial markets and foreign direct investment (FDI).[82]

By the late 1980s, the World Bank and IMF promoted the exportation of some of these measures (representing the prevailing "neoliberal ideas") to developing countries, within the framework of the "Washington Consensus". The countries were pushed to adopt some structural adjustment programmes (SAP) as a condition for granting them loans.[83] Some of such conditions include currency devaluation, austerity measures, elimination of food subsidies, cutting wages, improving governance and fighting corruption, raising the price of public services, privatisation of state-owned industries and resources, opening financial markets, and so on.[84] However, the impact of these measures on most of those countries was largely controversial and multiple criticisms were made about various elements of the SAP, particularly after its devastating effects on the welfare and economic growth of many African and some Latin American countries. Some of the criticisms and allegations are that: the cuts on social spending imposed by the SAP led to a dramatic cut in government spending on health and educational sectors; the forced privatisation of industries and resources are transferred to national elites and/or foreign corporations; the programmes undermine the national sovereignty of states and are used to advance neo-colonialism or neo-imperialism among other numerous criticisms.[85] Beate Jahn, in a rather sweeping opposition to "commercial

[82] Huwart and Verdier (n 35) 38.
[83] O'Brien and Williams (n 63) 88.
[84] Howard White, 'Adjustment in Africa' (1996) 27 Development and Change 785
[85] Irogbe (n 6).

empires" and the SAP in his critique of Immanuel Kant's conception of liberal internationalism, said:[86]

> [P]rivate interests within liberal capitalist states continue to pursue the opening up of markets abroad, and they continue to enlist their governments' support, through multilateral and bilateral arrangements—conditional aid, International Monetary Fund (IMF), and World Trade Organization (WTO) … The Structural Adjustment Programs (SAPs) connected to IMF loans have proven singularly disastrous for the poor countries but provide huge interest payments to the rich. In both cases, the "voluntary" signatures of poor states do not signify consent to the details of the agreement, but [their desperate economic] need. Obviously, trade—with liberal or nonliberal states—is not a moral obligation, yet conditional aid, like IMF and WTO policies, aims at changing the cultural, economic, and political constitution of a target state clearly without its consent.

The International Trade Organisation (ITO) would have been the third institution to be produced by the conference for the regulation of international trade, but its negotiations eventually failed due to the disapproval of the United States' Congress. Prior to the establishment of the World Trade Organisation (WTO) in 1995, the General Agreement on Tariffs and Trade (GATT) which was signed by 23 countries in 1947, and became effective on January 1, 1948, served as the framework for the gradual liberalisation of international trade. The measures in the GATT were aimed at eliminating an array of customs duties and state-imposed barriers to free trade. The WTO built on the GATT by establishing a Dispute Settlement Body (DSB) and expanding beyond the initial objective of trade negotiation to other sectors such as services and intellectual property. Today, the WTO remains the only global international institution that deals with rules of trade between nations, notwithstanding criticisms.

Another very significant development in the post-war global economic order has been the establishment of various regional economic institutions. From the end of the Second World War, a number of such institutions were created such as the European Economic Community (EEC) in

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[86] Beate Jahn, 'Kant, Mill, and Illiberal Legacies in International Affairs' (2005) 59 International Organization 177, 192.

1957 which has now been absorbed into the wider framework of the European Union (EU), the Association of South East Asian Nations (ASEAN) in 1967, the Economic Community of West African States (ECOWAS) in 1975, the Common Market of the South (MERCOSUR) in Latin America in 1991, the North American Free Trade Agreement (NAFTA) in 1994, and the most recent African Continental Free Trade Area (AfCFTA) which is still at its developing stage. The main objective of these bodies is to facilitate trade among their members and strengthen economic collaboration.

However, it remains a subject of debate if the aforementioned regional institutions and others are actually complementary to the advancement of global integration or a distortion of the international economic liberalisation objective by being facilitators of privileged relations among some classes of countries to the exclusion of other countries. For instance, when the Organisation for European Economic Cooperation (OEEC) was established in 1948 for the implementation of the Marshall Plan and to facilitate free trade among European states, the Soviet Union led Communist Bloc countries felt the compelling need to retaliate by establishing their Council for Mutual Economic Assistance (COMECON) – another privileged economic community – in 1949. In addition, while the initial agenda of ASEAN was to bring the non-communist South-Asian countries together, the promoters of AfCFTA and ECOWAS emphasise principles of Pan-Africanism as core objectives. While these economic collaborations may be beneficial to member states in their particular regions, they also reflect the world's ideological and continental divisions, which may be a hindrance to the proper integration of the global economy. Also, the fact that regional bodies such as ASEAN and the EU primarily promote and defend the interests of their member states in international trade negotiations, even within the larger WTO framework, seems contradictory to the WTO's non-discriminatory principle, which states that countries must open their borders to all nations without discrimination. Nonetheless, regional organisations may still be appreciated as a necessary component of economic globalisation due to the cultural and geographical closeness they have to their member countries.

As has been the case at the beginning of every stage of globalisation, technological developments also played a major role in the progression of modern international trade, finance, and investment. To begin with, the rapid growth of commercial civil aviation to transport people and cargo after the Second World War brought its operators closer, especially after the establishment of the

Convention on International Civil Aviation (also known as the "Chicago Convention") in 1944, with the objective of harmonising and standardising the use of airspace for safety, efficiency, and regularity of air transport.[87]

The development of the "containerisation" technique in the merchant marine after the war was also a major element in the present era of globalisation. It significantly improved international trade by lowering shipping cost, shortened shipping time and losses of transported goods from theft and damages – thus lowering the cost of insurance in comparison with the previous system. Prior to this development, goods to be transported were manually handled as "general cargo" or "break bulk cargo" – an old method whereby goods are loaded individually in bags, crates, boxes or drums, as opposed to containers or in bulk. According to a 2017 statistics, international trade via the use of containers now accounts for approximately 60 per cent of the global seaborne trade and valued around 12 trillion US dollars.[88]

The digital revolution (also referred to as the "Third Industrial Revolution"), which gradually began around the late 1950s, saw the radical shift to digitalisation from the mechanical and analogue technology. Even though Friedman's imagination as to the flattening of the global playing field may not be consistent with the reality as evidenced in numerous empirical statistics, it nonetheless portrays the noteworthy inventions that have been achieved in that realm. It is also undeniable that technological innovations, particularly in information and telecommunications, have transformed the methods of production, distribution and consumption of goods and services globally; and it is breaking imposed barriers especially for the creative industries in the developing economies.[89] Another emerging technological landmark that has been predicted to hugely affect the future of the global economy in this era is what has been described as the "Fourth Industrial Revolution". It means an expansion on the prior digital revolution, but characterised by "a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres".[90] Emerging technological breakthroughs in a number of fields such as advanced robotics, artificial

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[87] 'Convention on International Civil Aviation - Doc 7300' <https://www.icao.int/publications/pages/doc7300.aspx> accessed 30 April 2021.
[88] Container Shipping' (*www.statista.com*) <https://www.statista.com/topics/1367/container-shipping/> accessed 30 April 2021
[89] Fernanda Romano, 'The Digital Revolution: The World at the Click of a Button' [2009] International Trade Forum 22.
[90] Klaus Schwab, *The Fourth Industrial Revolution* (Crown Business 2017).

intelligence, 3D printing, biotechnology, autonomous vehicles, internet of things and even virtual currencies (such as cryptocurrency) are among the things that have been predicted to drive the Fourth Industrial Revolution. According to the World Economic Forum, these innovations will affect economic practice globally in a number of ways, and cultural and organisational practices will have to be rethought.[91]

2.3. The Effect of the Modern International Economic Order

The general impact of the present IEO is a mixed phenomenon that sharply varies depending on the continent, country, gender, race, and even classes within countries. In giving an insight into the effect of the IEO, this section of the thesis draws on some ideas of the dependency theory. This theory, which is a school of thought within the realm of international political economy, explains the "economic development of a state in terms of the external influences—political, economic, and social—on national development policies".[92] The theory contends that the global economic structure is shaped by certain histories, which favour some countries to the detriment of others, thereby limiting the latter's development possibilities.[93] While this theory, which originally evolved in Latin America in the late 1950s, has the tendency to neglect certain realities within some of the countries it seeks to advocate for, the general notion of the theory nonetheless represents the reality of the structure and the manner in which policies are implemented in the modern IEO. Adopting some positions of the theorists of dependency theory should not also be taken to suggest that this thesis is canvassing the dismissal, rather than the reconstruction, of the globalised economic order and its structures, as radically canvassed by anti-globalisation advocates.

While there exists those who view the developments in the current order as a facilitating tool for rapid economic prosperity and simplistically generalise the developments across the world,[94] many others argue that the entire structure only serves the needs of the privileged few at the expense of

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[91] 'The Fourth Industrial Revolution: What It Means and How to Respond' (*World Economic Forum*) <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/> accessed 30 April 2021.
[92] Connell (n 22).
[93] ibid.
[94] *See for example:* Peter Marber, *From Third World to World Class: The Future of Emerging Markets in the Global Economy* (Perseus Books 1998) 87.

the peripheral world.[95] For instance, Irogbe, who is a scholar of dependency theory, argues that the relationship between the developed and underdeveloped nations is asymmetric, and that the socio-economic and political structure of those underdeveloped countries has been subordinated to propagate the interests of the controlling nations using the IEI (particularly the World Bank, IMF, and WTO) as the manipulating device to the material benefit of their multinational corporations.[96] He emphasised the inaccuracy of many contemporary scholars of globalisation who paint the effects of the post-war global system as generally rosy and beneficial for all, thereby conveniently or inadvertently dismissing the persistent resistance from a large portion of the world.[97]

Counterarguments usually arise regarding the continued voluntary participation of the protesting underdeveloped countries in the IEIs even though they indeed find their practices unfavourable and unjust. In canvassing fairness in the GATT/WTO framework, Brown and Stern addressed such concerns by stating that the weaker nations are more often obliged to compromise with the rules and procedures that are pressed for adoption by more influential nations, because a withdrawal from membership of the IEI may lead to those countries emerging worse in terms of status.[98] This is because they will then lose all their existing rights in the regimes, such as the dispute settlement mechanism, the most-favoured-nation (MFN) treatment, access to developmental loans,[99] and other benefits that are exclusive to the membership of the IEIs. Another reason why such withdrawal may be unthinkable for the weaker countries is that a withdrawal from the multilateral institutions will leave them no choice but to enter into bilateral negotiations where they will be in a weaker position with counterparts who can easily bully them into accepting more unfavourable terms. This is one reason why this thesis, like many scholars, has chosen to advocate a fairness and justice-based restructuring of the institutions and the strengthening of multilateralism via the existing IEIs, rather than call for their eradication.

For developed countries and some developing nations, notwithstanding the existence of advocates within who are against some aspects of globalisation, such as the pro-Brexit lobby and President

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[95] Robert A Isaak, *The Globalization Gap: How the Rich Get Richer and the Poor Get Left Further Behind* (Pearson Education 2004).
[96] Irogbe (n 6) 11.
[97] ibid 7.
[98] Andrew G Brown and Robert M Stern, 'Concepts of Fairness in the Global Trading System' (2007) 12 Pacific Economic Review 293, 294.
[99] See also Jahn (n 86).

Trump's attack on institutions like the WTO, their gains from the global order are nothing in comparison with what could be suggested as benefits for their underdeveloped counterparts as consistently proven by numerous global empirical statistics on wealth and income inequality between nations. Although stressing the importance of the domestic policy environment, through interrelating with the process of globalisation, bringing about pro-poor economic growth is very fundamental. However, the administration of the policies and terms imposed by the IEO (such as the aforementioned SAP) hardly take the peculiarities of the poorer nations into proper consideration, thereby further increasing the existing impoverishment.

Notwithstanding the asymmetric nature of the effect of the IEO on different nations, historic and modern realities have proven that global economic integration and collaboration among nations with the aid of an unbiased and internationalised body cannot be argued against. Stiglitz, in his book, recognises that pro-globalisation policies have the potential to do a lot of good, provided they are properly undertaken and with the incorporation of the characteristics of each participating nation.[100] Nonetheless, the former chief economist of the World Bank and a Nobel Prize winner criticised the IMF for mismanaging the globalisation process for the least-developed countries as earlier canvassed.

Another major contributor to the debate on globalisation and its effect is Thomas Pogge. In his *World Poverty and Human Rights*,[101] he combines both normative and empirical analysis to prove that the IEIs are harming poorer countries via their policies. He explained that the poor nations continue to face unlimited barriers to export their own produce and even greater obstacles to offering their services where a decent income could be fetched. He further explained that the international negotiation order is fashioned in a manner in which the powerful nations enjoy a crushing advantage in terms of expertise and bargaining power, and the powerful nations who already have such advantage do not consider the interest of the greater poorer population as part of their objective.[102] Pogge established the need for reform of the IMF, World Bank and WTO so that their harm to the Third World is reduced. Like many authors, he is also not inclined to the idea

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[100] Stiglitz, *Globalization and Its Discontents* (n 1).
[101] Thomas Pogge, *World Poverty and Human Rights* (Polity 2008).
[102] ibid 26–27.

of dismantling the IEIs, because of their capability to be beneficial. He, therefore, calls for change in their behaviour towards the Third World countries.[103]

Brown and Stern pointed out that liberalisation in trade does not really extend to the developing countries in practice, especially in relation to the barriers and biases against exports from developing countries.[104] According to them, the most obvious instance of the bias is the array of measures which are used to restrict trade in agricultural products, and the high tariffs formerly imposed on products in which developing countries have a comparative advantage.[105]

Milner, in her *Globalization, Development, and International Institutions: Normative and Positive Perspectives*, also noted that the impact of globalisation on developing countries via the IEIs has been powerful, but not always beneficial.[106] She observed that the pressure that is constantly exerted on the IEIs by private producers and investors through developed countries has shaped the functioning of the IEIs to the detriment of most of the developing nations.[107] Four possible sources of problems with the IMF, World Bank and the WTO were identified as follows: (i) no impact; (ii) capture by powerful developed countries; (iii) capture by private producers and investors; and (iv) internal dysfunctions and failure of accountability.[108]

She suggested that perhaps the IEIs have little or no real impact on the developing nations, relying on the data that the IMF and World Bank only "constitute about 19 per cent of total debt outstanding by developing countries and only 13 per cent among middle-income countries."[109]

Herdegen also noted in his book *Principles of International Economic Law* that the welfare gains of globalisation did not materialise as anticipated for many poor countries due to the "great imbalances" between regions in international trade and the flow of investment.[110] He mentioned

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[103] Thomas Pogge, 'An Egalitarian Law of Peoples' (1994) 23 Philosophy & Public Affairs 195.
[104] Brown and Stern (n 98).
[105] ibid.
[106] Helen V Milner, 'Globalization, Development, and International Institutions: Normative and Positive Perspectives' (2005) 3 Perspectives on Politics 833.
[107] ibid.
[108] ibid 841-844.
[109] ibid 843.
[110] Matthias Herdegen, *Principles of International Economic Law* (Oxford University Press 2016) 22–23.

that not even the preferential treatment principle for developing countries in WTO law is capable of addressing the gross asymmetry and inequalities.[111]

Considering all the claims above regarding the asymmetric nature and substantial unfavourableness of the IEO to the poorer nations, the next section will explore some specific complaints of developing nations regarding the imbalances in the prevailing economic order.

2.4. The International Economic Order and Complaints from Developing Countries

Following claims from scholars and experts regarding the asymmetric nature and detrimental impact of the IEO on the developing world as discussed in the previous section, this part will discuss some of the complaints expressed by developing countries with a view to establishing a basis to embrace fairness in the administration of the IEO. The scope of the complaints to be discussed will cover issues from three different aspects of international trade law. Specifically, the WTO dispute settlement system, the Agreement on Sanitary and Phytosanitary Measures, and the Agreement on Agriculture. It must be emphasised that the sole purpose of the analysed complaints in this section is mainly to affirm the earlier claims of unfairness in the IEO in sections 2.2 and 2.3, which are mainly based on historical and economic perspectives, from a legal point of view. Also, these three analysed complaints do not form an exhaustive list of all the aspects of international economic relations that less-developed jurisdictions find problematic to their social and economic development interests. They have been selected for discussion due to their popularity and importance in the policy discourse. Beyond the three selected complaints, there are numerous other areas of pressing concern, such as matters relating to intellectual property as well as the subsidies regime. This thesis specifically critiques the unfairness in the international subsidies' regime as the major case study in chapter four.

2.4.1. The WTO Dispute Settlement System and Developing Countries

One of the most celebrated innovations to the international trading system by the ministerial meeting in Marrakesh (also known as the Uruguay Round) was the introduction of the current quasi-judicial dispute settlement mechanism. Many scholars and experts regarded it as an applaudable improvement to the system previously in existence under the GATT regime. Since

[111] ibid.

the inception of the new system in 1995, over 600 dispute settlement applications have been received by the WTO and over 350 rulings have been issued.[112] This is far more than the total number of disputes that were accepted for settlement under the old GATT system. The need for an effective dispute settlement mechanism cannot be overemphasised in a system like the WTO, because of its ability to reduce uncertainties by securing market access rights, which will ultimately promote efficiency and confidence in the global economy.

That being said, the effectiveness and impact of the Dispute Settlement Body (DSB) have been controversial, particularly in relation to developing countries. While the above figure shows an improvement in claims initiated by WTO Members, the ratio of claims initiated by developing countries is far less than their developed counterparts despite their majority status. To date, no least-developed country (LDC) has been a complainant or respondent in any WTO dispute.[113] Many reasons have been postulated for this "under-utilisation" of the settlement system by poorer Members, such as the burden of heavy cost to prosecute the cases, lack of trust in the impartiality and independence of the system, and the lack of coerciveness in the enforcement of the DSB's ruling.[114] While attempts have been made by some to blame the under-utilisation on low volume of trade from those countries,[115] Bown devised an innovative method (more accurate in my opinion) which generates a complaints-filed-to-complaints-possible ratio to disprove the low trade volume point of view.[116] It is also relevant to state that there have been few efforts to address the issue of unaffordable litigation costs. For instance, the Advisory Centre of the WTO (ACWL), a non-governmental organisation independent of the WTO, was established in 2001 with the mission of providing "developing countries and LDCs with the legal capacity necessary to enable them to take full advantage of the opportunities offered by the WTO".[117] Nonetheless, the sustainability of such an entity whose main source of funding is from voluntary donation from a few mostly

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[112] 'WTO, Dispute Settlement Gateway' <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 30 April 2021.

[113] 'WTO, Developing Countries in WTO Dispute Settlement' <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm> accessed 30 April 2021.

[114] T Stostad, 'Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and Its Impact on Developing Countries' (2006) 39 Cornell International Law Journal 811.

[115] Peter Holmes, Jim Rollo and Alasdair Young, *Emerging Trends in WTO Dispute Settlement: Back to the GATT?* (The World Bank 2003).

[116] Chad P Bown, 'Participation in Wto Dispute Settlement: Complainants, Interested Parties, and Free Riders' (2005) 19 The World Bank Economic Review 287.

[117] 'ACWL's Mission' (*ACWL*) <http://www.acwl.ch/acwl-mission/> accessed 30 April 2021.

developed countries is unpredictable. It is also unclear if such an independent entity can be successfully brought under the scrutiny of justice obligations like it would have been for an organisation like the WTO, which is actually responsible for the management and allocation of public goods. This thesis is therefore inclined to Stostad's view that "in order to put developing country respondents on a level field vis-à-vis wealthier complainants, legal assistance, up to and including outright advocacy, should be provided through the WTO itself".[118]

It is important to mention that a comprehensive assessment of the DSU[119] was supposed to have been carried out within four years from the date it entered into force, with the objective of determining whether its provisions would be needed to be revised, terminated or simply extended.[120] However, this assessment never occurred. Also, in the Doha Round, which was officially launched in 2001, the improvement of the dispute settlement system was included as one of its agenda items with a deadline of 2003 for Members to submit proposals. By 2004, about 40 suggestions had been submitted by Members to improve the system, including ideas for a compensation mechanism that would be genuinely enforceable with more effective and timely remedies. Alas, the impasse that negotiations at the Doha Round have faced made the realisation of these suggestions uncertain. Nonetheless, this paper still strongly opines that urgent changes are required to cure the defects in the existing system.

Many issues have been raised concerning the dispute settlement system in relation to developing nations and LDCs. But among all, this thesis takes the view that the most profound irregularities are the issues bothering on the nature of the available remedies and the mode of enforcement of the rulings of the DSB. As will be argued below, the system is wanting of elementary justice and adjudicatory rudiments that can be sufficient to dissuade Members from flouting the WTO agreements and can compel defaulting Members to discontinue an existing breach against other Members, especially if the Member state suffering the breach is a poor nation.

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[118] Stostad (n 114) 840.
[119] Dispute Settlement Understanding: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].
[120] 'WTO | Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes <https://www.wto.org/english/docs_e/legal_e/53-ddsu_e.htm> accessed 30 April 2021.

2.4.1.1. Methods of Resolving Trade Dispute under the DSU

To begin with, it is crucial to layout the ways in which trade disputes can be resolved under the DSU. Article 3.7 of the DSU provides:

> In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

In essence, there are three ways in which trade disputes can be resolved under the DSU: (1) the respondent party that is accused of the breach is required to discontinue the conduct in question; (2) voluntary compensation may be provided to the party suffering the breach if the discontinuation of such breach is deemed impracticable within a reasonable time, for any reason; (3) the complaining party (subject to the approval of the DSB) may have the right to retaliate by suspending the application of any other existing concession or obligations under the WTO Agreement that was breached with respect to the other Member.

2.4.1.2. Implications for Poor Countries

From all of the above, it can be observed that the WTO dispute settlement system has no provision for compulsory compensation nor a viable penalty against a party that contravenes the WTO Agreement. In fact, it appears to tolerate the continued breach of the Agreement under the guise of its "member-driven" approach as opposed to standard judicial methods as practised in other international adjudicatory systems. By implication, the DSB appears to only have a declaratory authority to rule on the breach of the Agreement without the power to impose a specific mandatory sanction. Even in the event that compensation may be rightly due to the winning party as provided

for in the DSU, the DSU still expects the terms of the compensation to be voluntarily negotiated among both parties. Article 22.2 of the DSU states:

> If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation.

The implication of this "voluntary negotiation" on weaker nations, especially when the party in breach is a developed country, is that it compels them to enter a bilateral negotiation on the terms of the compensation. This thereby essentially defeats the objective of WTO as a multilateral forum that seeks to protect weaker nations from such a potential asymmetric negotiating position. More importantly, reaching a resolution on what, when, and how to compensate (be it monetary, market access, tariff concession, or any other means) all depends on the will of the party found to be in breach of the Agreement to tender any compensation – and the ability of the winning party to obtain it in an effective and timely manner. Poor developing countries and LDCs that obtain a favourable ruling will most likely be unable to pull such political and economic strength that could be capable of compelling a breaching developed counterpart to compensate them in a manner that is commensurate to their loss or at all.

The compensatory mechanism under the DSU fundamentally deviates from established domestic and other international judicial practices because it possesses some features that are ambiguous to elementary principles of judicial practices. Aside from the concerns above, another feature of the DSU system is that compensation does not apply to injuries or losses already suffered by a party as a result of the breach of another party. This is contrary to the standard method of computation of damages in general civil matters where the Judge or Arbitrator takes account of all the previous losses suffered by the winning party until the date the party in breach complies with the order of the court. Rather, the DSU only envisages compensation for breaches that continue to occur after the DSB's ruling, which is only effective in a prospective manner. A careful perusal of the wording of Article 3.7 of the DSU will demonstrate that the objective of the dispute settlement mechanism is primarily to secure the withdrawal of the measures concerned if they are found to be in breach

of any of the WTO agreements. Thus, compensation can only come to play as a supplement to the withdrawal remedy in the event that the party in breach refuses to discontinue the inconsistent measure. In other words, actions in line with the DSU are not taken for breaches that occurred before the judgment regardless of the damages it might have caused to others, and the losing party which is in breach can only compensate the winning party for the post-judgment continued breach if this is agreed. This flagrantly deviates from the general principles of State responsibility for an international wrongful act which require retrospective restitution in addition to full compliance with international obligations.[121]

Another issue with the settlement system is that, even if compensation is paid, the conduct of the party in breach is not required to be terminated. Both Articles 3.7 and 22.1 of the DSU provide that compensation is only a temporary measure. Therefore, if the party in breach chooses to continue the WTO-unlawful conduct, the winning party may continue to suffer the injury. Also, the DSU failed to stipulate the nature or forms the compensation may take. The only related provision on the form is Article 22.1 which states that "compensation is voluntary and, if granted, shall be consistent with the covered agreements". However, a potential legal issue may arise if the losing party chooses to compensate the other by making further commitments on market access and tariff concession, because such reduction of tariff and market access to an exclusive member may violate the MFN principle of the WTO. Even though the DSB has no power to interfere with negotiations between parties, other Members may institute claims against such discriminatory measure.

Aside from the powers of the DSB to declare the conduct of the breaching party as inconsistent with the Agreement, and the second option which requires both parties to enter into negotiation for voluntary compensation, the party suffering the breach may consider retaliation as a last resort, by suspending the application of any other existing concession or obligations under the covered agreement with respect to the other Member. Prima facie, this can only be reasonable in disputes between two economically equal parties. Apart from the fact that it seems like a judicial endorsement of self-help, it technically disenfranchises poor states (i.e. most developing nations and LDCs) with a less-diversified economy and minimal trade volumes from reaping the benefits

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[121] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) 2 Yearbook of the International Law Commission, *Articles 31 and 36*.

of the dispute settlement mechanism. This is because, unlike cases between developed nations, there is likely not going to be enough leverage. Moreover, retaliation cannot be an option for many of these nations, as it may lead to additional damage to their economy. For instance, in analysing the implication of Nicaragua's retaliation against the European Community after the *EC – Bananas* dispute,[122] Jiaxiang maintained that the country's retaliation in another sector was "in essence only an emotional one or a kind of anticipated benefit".[123] This is because the trading volume resulting from the retaliatory measures cannot adequately compensate the actual losses suffered by the Nicaraguan banana industry, which is critical to its economy.[124] Resulting from the same Banana dispute above, Ecuador initially accepted the European Community's offer of compensation, but it was in fact not made whole. The Ecuadorian government finally settled on the last alternative by retaliating against the EC. With the DSB's approval, it withdrew its existing commitment to the EC on the protection of intellectual property. However, such retaliatory measure was a no-win result for Ecuador because the EC's interest in intellectual property protection in Ecuador was not significant. On the other hand, the country turned itself into a hostile environment for other foreign investors who became wary of an environment where piracy was rampant and intellectual property rights were not adequately protected.[125]

In view of all the above, this thesis opines that there is almost no gain for the participation of poor countries in the WTO dispute settlement system, since aside from the heavy cost of litigation, compliance with the adopted rulings and the compensation that may be due to the winning party are technically made subject to the conscience of the party in breach of the agreement.

2.4.2. Agreement on Sanitary and Phytosanitary Measures and Developing Countries

The SPS Agreement is among the agreements reached at the conclusion of the Uruguay Round of the multilateral trade negotiations, for the purpose of regulating the application of sanitary (relating

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[122] Panel Reports, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/ECU (Ecuador) / WT/DS27/R/GTM, WT/DS27/R/HND (Guatemala and Honduras) / WT/DS27/R/MEX (Mexico) / WT/DS27/R/USA (US), adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR 1997:III, p. 1085.
[123] Hu Jiaxiang, 'The WTO Dispute Settlement System at Twenty Years: From the Perspective of the WTO Compensation Mechanism' (2016) 7 Yonsei Law Journal 1, 12.
[124] ibid.
[125] ibid 14.

to animals) and phytosanitary (relating to plants) standards dealing with food safety and animal/plant health. The preamble of the SPS Agreement affirmed the right of Members to adopt and enforce necessary measures to protect the lives and health of humans, plant and animals, provided such measures are not arbitrarily or unjustifiably discriminatory in application. In recognition of the fact that the measures had been and can further be used as "disguised restriction on international trade", the SPS Agreement also affirmed in the fourth paragraph of its preamble that its aim is to minimise the negative effect of such measures on trade.[126] While the Agreement also seeks to harmonise the SPS measures of various Member states by recommending (not obligating) an international standard,[127] it, however, does not exclude them from applying higher standards where it is believed that there is scientific justification to that effect or appropriate risk assessment.[128]

The stated objective of the SPS Agreement is commendable because it aims to balance the contending goals of protection of health, on the one hand, and liberalisation of trade, on the other hand. Also, one must be aware of the attempt made by the SPS Agreement to recognise the fact that developing countries may encounter special difficulties in complying with some of the imposed measures, either due to less technical capabilities or for other reasons. However, it has been disputed that the SDT provisions for developing countries (including LDCs) in the Agreement achieve their stated desire to "assist them in their endeavours in this regards",[129] just like other SDT provisions in other WTO Agreements.[130]

Adibe contends that the SPS measures and other technical barriers to trade (TBT) usually pose a greater burden on developing countries, because most of the standards, other than those set by international bodies, are usually set by developed countries.[131] Consequently, this subjects poor countries to standards that impose far greater costs of compliance, which as a result excludes their

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[126] 'WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)' <https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm> accessed 30 April 2021.
[127] ibid, Article 3.1.
[128] ibid, Article 3.3.
[129] ibid, 7th preamble.
[130] Denise Prévost, 'Operationalising' Special and Differential Treatment of Developing Countries under the SPS Agreement (2005) 30 South African Yearbook of International Law 82.
[131] Emeka Adibe, 'World Trade Organisation (WTO): Trade Rules/Agreements and Developing Countries' (2013) 4 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 121, 133.

products from markets of developed countries.[132] As will be argued under the subsequent chapter dwelling on distributive justice and IEL, the need for effective SDT provisions in the SPS Agreement and other international economic regulatory disciplines need to be recognised in light of economic, historical, technological and political peculiarities of various Members; thus, "one size does not fit all".[133] As Hamwey notes:

> [T]he playing field resulting from international trade agreements that have ostensibly equivalent rules for all contracting parties, may provide a much smaller policy space for developing than developed countries because of differences in initial conditions and national policy implementation capacities. Efforts to establish a level playing field for international trade must recognise and address this disparity.[134]

In Mayeda's critique of the harmonisation of the SPS and TBT measures, she succinctly describes the asymmetric implication of the measures as follows: "Because the standards of developed countries will tend to be more similar in other importing developed countries than will the standards of developing countries, the costs of compliance for developed countries tend to be lower".[135] Adibe notes that apart from the fact that the lack of effective SDT provisions accentuates the existing economic imbalances between poor and rich nations, the SPS measures may be used as another protectionist mechanism, which militates against the stated development objectives of the WTO.[136] He concludes that it would not be a violation of the SPS Agreement if developed countries are advised to adopt standards that are similar to those which are observed by developing countries, rather than obligating outright identity with developed countries' complex standards.[137] This would not necessarily amount to lowering the level of consumer safety in the export market of developed countries, especially considering the fact that some of those imposed measures are

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[132] ibid.
[133] ibid, 5. cited: Bernard Michalopoulos Hoekman Constantine Winters, L Alan, *More Favorable and Differential Treatment of Developing Countries: Toward a New Approach in the World Trade Organization* (The World Bank 2003).
[134] Robert Hamwey, 'Expanding National Policy Space for Development: Why the Multilateral Trading System Must Change' (University Library of Munich, Germany 2005) 0511005.
[135] Graham Mayeda, 'Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries' (2004) 7 Journal of International Economic Law 737.
[136] Adibe (n 131) 133.
[137] ibid.

arbitrary and could be inconsequential to the actual health and safety concerns of consumers,[138] if compared with other less costly standards.

Notwithstanding the above, it is appropriate to examine some of the SDT provisions in the SPS Agreement in order to determine to which degree the stated desire to assist developing countries in complying with the measures is given effect. The primary SDT provisions are contained in Article 10 of the SPS Agreement, although, Article 14 and paragraphs 2, 8, and 9 of Annex B also enshrine provisions that may be considered as forms of SDT for developing countries.

Article 10.1 of the SPS Agreement provides that, "In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members". This is because some developed countries apply complex and onerous methods in verifying the compliance of products with their SPS requirements, which in turn, often creates complications for many developing countries due to limited technological capacity and dissimilar methods. Therefore, if adequate consideration is taken at the time of preparing and applying the measures, such complications could be avoided. However, while the provision appears progressive, judicial interpretation and practice do not seem to favour the claim. Even though it is trite law that the use of the word "shall" in legal instruments, as above, is to be construed in the mandatory sense,[139] the lack of specificity in terms of how the special needs of developing countries should be taken into account renders the provision ambiguous and almost inoperative.

In the *EC–Biotech* dispute,[140] Argentina presented the first opportunity for a WTO panel to interpret Article 10.1 of the SPS Agreement. The claim was concerning certain measures taken by the EC and its Member States which affected agricultural and food imports from Argentina. Argentina contended that the EC had failed to apply its legislation in a manner which takes account of developing country Members' needs. The Panel held that the phrase "take account of", as contained in the provision, does not prescribe any specific result to be achieved and that merely because a developed country did not afford SDT to a developing country Member does not

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[138] Moonhawk Kim, 'Disguised Protectionism and Linkages to the GATT/WTO' (2012) 64 World Politics 426.
[139] Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (Thomson Reuters 2014).
[140] Panel Report, *EC – Approval and Marketing of Biotech Products*, WT/DS291/DS292/DS293/R (2006).

establish a prima facie case that the developed country Member did not "take account of" the developing country's needs when it made its decision. The Panel stated in its report:

> [T]he obligation laid down in Article 10.1 is for the importing Member to "take account" of developing country Members' needs. The dictionary defines the expression "take account of" as "consider along with other factors before reaching a decision". Consistent with this, Article 10.1 does not prescribe a specific result to be achieved. Notably, Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has lead, or may lead, to a decrease, or a slower increase, in developing country exports.[141]

The above position was cited with approval by the Panel in the most recent *US–Animals* case, where Argentina, again, challenged some US measures affecting the importation of animal products from Argentina.[142] Although the Panel found the measure imposed by the US as inconsistent with the rules on other grounds, it failed to agree with Argentina's claim that Article 10.1 had also been contravened.[143]

In light of the interpretation of Article 10.1 of the SPS Agreement in the above cases, it could be concluded that the use of mandatory language for SDT provisions is not sufficient to make such provisions enforceable: SDT provisions, including those beyond the SPS Agreement,[144] therefore require specific and unambiguous conditions to be met, and actions to be taken in response to the envisaged needs of developing countries.

Similar to Article 10.1 discussed above, Article 10.2 of the SPS Agreement further provides:

> Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer

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[141] Ibid, para. 7.1620.
[142] Panel Report, *United States — Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R (2015).
[143] ibid. paras. 7.1620-7.1621.
[144] For example: Article 15 of the Anti-Dumping Agreement (which has a similar SDT provision) was also held not to impose any obligation because of its "undefined parameters" in *EC-Bed Linen, US-Steel Plate and EC-Pipe Fittings.*

> time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.

The quoted provision is a relevant SDT measure because compliance with new SPS requirements often requires investment in new resources, building new infrastructure, and substantial changes to processing and production systems. For that reason, it is important that considerable time should be afforded to developing country Members before compliance ought to be expected. Unlike Article 10.1, as analysed above, this provision has not been subjected to the interpretation of the WTO adjudicatory bodies. However, it has generated controversies due to the lack of implementation by developed nations, and its ambiguous legal effect if its wording is strictly analysed. This prompted a group of developing countries, at the run-up to the Doha Ministerial Meeting, to push for the modification of Article 10.2 to include a specific and mandatory period of at least twelve months between the date of the notification of the measure and the date of its entry into force. An agreement was eventually reached that the phrase "longer time-frames for compliance" shall be understood to mean a period of not less than six months.[145]

Notwithstanding the adopted interpretation at the Doha Ministerial Meeting, possible contentions may still arise from the interpretation of the Article if presented before a panel. This is because the use of the word "should" has been held in a similar provision of another WTO Agreement to be a hortatory word that ordinarily imposes no obligation. In *EC-Bed Linen*, the Panel in interpreting Article 21.2 of the DSU held:

> [W]e find nothing in that provision which explicitly requires a Member to take any particular action in any case. Nor has India pointed to any contextual element which would suggest that the hortatory word "should" must nonetheless be understood, in Article 21.2 of the DSU, to have the mandatory meaning of "shall" … In addition, the fact that there is no specific action set out in Article 21.2 makes it unlikely that Members intended the provision to be mandatory – the lack of specificity in this regard implies rather a hortatory use of should.[146]

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[145] WTO Ministerial Conference, *Implementation Related Issues and Concerns*, WT/MIN(01)/17, November 2001.
[146] Panel Report *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - Recourse to Article 21.5 of the DSU by India* WT/DS141/RW, 24 April 2003, as modified by the Appellate Body Report WT/DS141/AB/RW, paragraph 2.667.

While it is hoped that WTO adjudicatory bodies in the future will not follow the above position if a case arises on that ground, the intention of this thesis for analysing the above two provisions (Articles 10.1 and 10.2 of the SPS Agreement) is to point out the weaknesses and inherent lacunas in the provisions that seek to protect developing countries in the SPS Agreement. Another aspect of the SPS Agreement, among others, that has generated issues is the lack of specificity and mandatory construction of Article 10.4 of the SPS Agreement which encourages the facilitation of developing countries' participation in international standard setting which is dominated by developed Members.

In general, while it is recognised that the need to grant concessions to developing countries' concerns should not be an excuse to jeopardise the right of Members to impose necessary measures that are scientifically justifiable for the prevention of unacceptable risks, the bone of contention is that creating relaxed regulations through which standards that are masked methods of protectionism can slip undermines the stated objective of the SPS Agreement to enable fair market access.

2.4.3. The Agreement on Agriculture and Developing Countries

The Agreement on Agriculture (AoA) is one of the treaties negotiated at the Uruguay Round, and it entered into force with the establishment of the WTO in 1995. The stated objective of the Agreement is to set new standards for the liberalisation of agricultural trade and to "establish a fair and market-oriented agricultural trading system".[147] Yet, the degree of fairness in the system has attracted wide criticism from analysts of various interests. Some have opined that nowhere is the tension between the opponents and supporters of the existing international trading system more obvious than in matters involving agricultural trade.[148] Agriculture has always been one of the most controversial subjects in multilateral trade negotiations, and it was also one of the most contentious issues in the Doha Round.[149] The contention stems from the fact that the AoA is perceived to favour

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[147] 2nd preambular paragraph.

[148] Carmen G Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries Symposium: Trade, Sustainability and Global Governance' (2002) 27 Columbia Journal of Environmental Law 433, 437.

[149] Kevin Watkins, 'Main development from WTO talks is a fine line in hypocrisy' *The Guardian* (26 August 2002) <https://www.theguardian.com/business/2002/aug/26/globalisation> accessed 30 April 2021; 'The WTO under Fire' [2003] *The Economist* <https://www.economist.com/special-report/2003/09/18/the-wto-under-fire> accessed 30 April 2021.

industrialised countries, particularly the United States and the European Union, to the detriment of developing countries. The rules are seen to encourage the aforementioned territories to enormously subsidise agricultural production domestically, and dump their excesses on the global market at artificially low rates while requiring developing countries to open up their markets to injurious and unfair competition from producers operating under the subsidised condition of some of the industrialised territories.

In expressing a human rights perspective on agricultural trade and the WTO, Smaller opines that the AoA adopts an export-oriented agricultural policy – which only benefits the privileged few that have access to the enabling infrastructure, credits, resources and foreign market – as opposed to a human rights oriented policy that would be capable of improving people's livelihoods.[150] In her words, the AoA "entrenches the right to export rather than human rights".[151] This is notwithstanding the provisions of Articles 13 and 14 of the Doha Ministerial declaration which reaffirm the commitment "to enable developing countries to effectively take account of their development needs, including food security and rural development" regarding the AoA.[152] The aim of this section is to evaluate some of the complaints of developing countries regarding the AoA.

2.4.3.1. International Agricultural Trade before the AoA

Prior to the GATT of 1994, agricultural trade was effectively excluded from the previous international trade treaties, based on the dominant opinion that agriculture was a unique sector which could not be treated like other sectors for reasons of national food security. Also, with the development of the manufacturing economy, agricultural trade saw a relative decline. This led to social and political agitations calling for an end to the decline, and that agriculture should be protected from the rigours of the international market. Although some individual agricultural products did appear as commodities in negotiations (one thinks of the International Wheat Agreement and the International Dairy and Meat Agreement that were negotiated under the

[150] C Smaller, 'Planting the Rights Seed: A Human Rights Perspective on Agriculture Trade and the WTO' (2005) 1 Institute for Agriculture and Trade Policy <https://www.iatp.org/sites/default/files/451_2_69823_0.pdf> accessed 30 April 2021.
[151] ibid 8.
[152] 'WTO, Doha 4th Ministerial' <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> accessed 30 April 2021.

Kennedy Round), it was not until the opening of the Uruguay Round that it was firmly placed on the GATT negotiation agenda.

As a result of the exemption of agriculture from the previous GATT rules, quantitative import restrictions, use of agricultural subsidies, and numerous protectionist measures were largely unregulated and unrestricted for many years. This led to high levels of protectionist measures and domestic/exports subsidies for agriculture, mainly in the industrialised countries. These measures by mainly industrialised nations created large distortions to the global food market, and it led to the depression of the global price for temperate agricultural products to noncompetitively low levels. Eventually, the need to reduce the incessant friction between the European Commission and the United States over agricultural matters inspired the consensus of bringing agricultural trade within the ambit of the GATT negotiation and the eventual agreement after seven years of negotiation.

2.4.3.2. Components of the AoA

It is vital to explain the main components of the AoA before any attempt to analyse their implications for developing nations. The AoA has three key components which are: market access, domestic support and export subsidies. Each of these components is referred to within the AoA as market access (Article 4), domestic support (Article 6), and export subsidy commitments (Article 9). The stated objective of the market access component is to increase international agricultural trade by decreasing border barriers to trade such as taxes and duties, which are commonly known as tariffs. This component requires countries to abolish "quantitative restrictions", which basically limit the quantity of agricultural goods entering their markets. The AoA also requires the conversion of all non-tariff import restrictions (such as quotas, variable import levies, minimum import prices, embargoes, and non-tariff measures maintained by state enterprises) into tariff barriers that provide a corresponding level of protection – a process known as "tariffication".[153] The corresponding tariffs ensuing from this conversion, in addition to existing duties, are then required to be bound and reduced below a 1986-88 base level over a period of several years,

[153] Article 4.2 Agreement on Agriculture, in conjunction with footnote 106.

depending on whether the country is developed, developing or least-developed.[154] The exact amount of the reduction is also specified in the tariff schedule of each individual country.

Domestic support generally includes all types of governmental assistance to farmers, ranging from production subsidies for specific agricultural products or guaranteed prices to the provision of infrastructure and even facilitation of research for the promotion of agriculture. The largest percentage of domestic supports is provided by developed countries, and their farmers are paid billions of dollars as production subsidy each year. The stated objective of the AoA's domestic support component was to limit the amount of monetary interventions by governments that are going into production of farm goods, in other words, to decrease subsidies that distort the independent decision of farmers regarding what and how much they will produce.

For ease, the domestic supports are categorised into three colour-coded so-called "boxes" (amber, blue and green boxes) which represents their levels of permissibility.[155] The amber box entails the kind of subsidies that are considered by the AoA to be the most distorting. These domestic subsidies are required to be reduced within a certain span based on an "Aggregate Measure of Support" (AMS), which aims to estimate all possible financial factors that may influence a farmer to produce a certain product. Unlike the amber box, the blue and green boxes are permissible. The green box policies are deemed not to have any major effect on trade and production. Examples of the green box policies include income support to farmers decoupled from production, crop insurance programs, income safety-net programs, and payments under environmental programs. On the other hand, blue box subsidies are considered to fall into neither of the amber or green categories but are also exempted from the AMS calculation. They are policies that permit countries to make direct payments to farmers if the payments are for programmes that limit the quantity of production.[156] Examples are the deficiency payments of the United States and the compensation payments by the European Union, in which farmers are paid the difference between a government target price for agricultural produce and the corresponding market price.[157]

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[154] Annex 5.6 Agreement on Agriculture.
[155] Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (4th edn, Cambridge University Press 2017) 875.
[156] Article 6.5, WTO Agreement on Agriculture (1995).
[157] Gonzalez (n 148) 457.

The third component of the AoA is the export subsidy. It refers to payments given by governments to firms that export agricultural produce to cover the cost of doing business. The AoA provides a list of six export subsidies that should be reduced by WTO Members[158] within a given period, depending on the development status of the country. It also prohibits the introduction of new subsidies that were not subsidised during the 1986-90 base period.[159] However, the above position changed after the 2015 Ministerial Declaration in Nairobi, when all Members finally reached agreement on an immediate standstill and gradual elimination of agricultural export subsidies over specified period of time, depending on the status of each country.[160] This was described as the most significant outcome of the tenth Ministerial Conference of the WTO,[161] although the use of export subsidies by countries had largely declined even prior to the Nairobi agreement,[162] and most controversies relating to subsidy are usually about the domestic subsidies.

2.4.3.3. Complaints about the AoA

There are a number of criticisms about the regulation of trade in agriculture by WTO developing Members, and even some developed countries.[163] Such disapprovals range from the fact that the rules have locked all countries into an uneven playing field, which encourages some Members to be at a more advantageous position to the detriment of others, to the fact that the Agreement has failed to realise its stated purpose of facilitating a fair trading system. While a simplistic study of the rules may initially suggest that they are capable of addressing its stated aims, the reality in practice has revealed numerous deficiencies and gaps in the AoA.

To begin with, the provisions on market access have turned out to produce very little liberalisation, especially in the highly protected markets of OECD countries.[164] Notwithstanding the

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[158] Article 9.1 (a) – (f), WTO Agreement on Agriculture (1995).
[159] ibid. Article 3(3).
[160] 'WTO, Nairobi Package' <https://www.wto.org/english/thewto_e/minist_e/mc10_e/l980_e.htm> accessed 30 April 2021.
[161] E Díaz-Bonilla and J Hepburn, *Evaluating Nairobi: What Does the Outcome Mean for Trade in Food and Farm Goods?* (ICTSD 2016) 11.
[162] ibid 12.
[163] *For example:* Owen Hembry Hembry Owen, 'US Dairy Subsidies Spark Trade War Fears' (25 May 2009) <https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10574521> accessed 30 April 2021.
[164] Dale E Hathaway and Merlinda D Ingco, 'Agricultural Liberalization and the Uruguay Round' [1995] The Uruguay Round and the developing economies 1, 8. *See also* 'High Levels of Agricultural Support in OECD Countries: A Cause for Concern for Developing Economies - OECD' <http://www.oecd.org/newsroom/highlevelsofagriculturalsupportinoecdcountriesacauseforconcernfordevelopingeconomies.htm> accessed 30 April 2021.

"tariffication" requirement which obliges the conversion of existing non-tariff barriers to tariffs and the further prohibition on new non-tariff barriers, many industrialised countries have evaded this obligation by employing what is largely referred to as "dirty tariffication". This involves the setting of tariff equivalents for non-tariff barriers at unjustifiably high levels,[165] therefore nullifying the aimed benefits of tariff reduction and bindings. Dirty tariffication in most cases results in higher protectionism than under the old system where quantitative restrictions were permissible. Some research also claims that the highest tariffs by developed countries were imposed on products of particular interest to developing nations, such as tobacco, sugar, meat, milk, and to a lesser degree, vegetables and fruits.[166]

The implementation of the AoA's requirement on tariff reduction has also been used by some developed countries to restrict market access, which largely affected producers from developing countries. According to a publication of the Food and Agriculture Organization of the United Nations (FAO), OECD countries made large tariff reductions on agricultural produce that was not domestically produced or that already had quite low tariff levels, in order to make minimal concessions on agricultural imports that competed with items that were domestically produced.[167] This was possible because the tariff reduction provision of the AoA requires a 36 per cent average reduction in tariffs (subject to a 15 per cent minimum reduction on each tariff), and thereby permitted countries to select which tariffs to reduce as they wish. An example of this mentioned by the FAO is that tariff reduction on temperate-zone products are usually lower in the OECD countries, as against tropical products that are often higher. This is because while developing countries mostly have the capacity to produce both tropical and temperate agricultural products, their production of temperate products competes directly with agricultural products of most developed countries.[168]

The strategic use of the special safeguard provision of the AoA also created an opportunity for developed countries to restrict market access. Article 5 of the AoA provides for the special safeguard which can be invoked by imposing additional duties where there is an import surge or

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[165] Gonzalez (n 148) 460.
[166] ibid 461.
[167] 'FAO - Session III: U.N. Food & Agric. Org. (FAO), Symposium on Agriculture, Trade and Food Security' <http://www.fao.org/docrep/meeting/x2998E.htm> accessed 30 April 2021.
[168] Gonzalez (n 148) 461.

the prices are particularly low in comparison with 1986-88 levels. This was alleged to have been abused by the EU and most OECD countries by setting trigger prices far above the 1986-88 average world price used for conversion of non-tariff barriers into tariffs. On the other hand, most developing countries do not have access to the special safeguard provision because it is only available for countries that have historically engaged in tariffication. Therefore, many poorer nations do not have a similar ability to protect their domestic farmers against dumping from over-subsidised importers.[169] This provision could have been fairly beneficial to poorer countries if it was equally available to all without the technical exclusion.

Furthermore, the AoA has enabled some Members (mostly developed countries) to maintain trade-distorting subsidies by the exclusion of the blue and green box subsidies from the Current Total AMS. This undermines the effectiveness of the subsidy reduction obligation by excluding the exact types of supports that are being utilised by the US and EU. The EU's compensation payment and the US' deficiency payment are within the ambit of the acceptable blue box subsidies: both of which farmers are paid the difference between the original market price for a given agricultural product and a higher target price which is established by the governments. As argued by Khor and some others, the green and blue box subsidies can be just as distorting to trade, because the effects could sometimes be the same or even more than the amber ones.[170] He mentioned that while the payment of higher prices and even export subsidies could have been stopped, this is still made up for through the implementation of various kinds of permissible subsidies.[171] On the other hand, the amber box subsidy reductions as required by the AoA have been proven to be less significant because they were based on the 1986-88 period of extremely high subsidies. Thus, only a few percentages were required to be reduced by WTO Members for compliance by 1995 when the AoA went into effect.

The implication of all the above, among many other complaints, is that the AoA has enabled the more powerful nations to maintain import restrictions and unfair subsidies that are trade-distorting. In fact, while the markets of developed nations are largely inaccessible for agricultural producers

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[169] ibid 463.
[170] 'Martin Khor, Third World Network Statement on Agriculture at ECOSOC' (2003) <https://web.archive.org/web/20101227122844/http://www.twnside.org.sg/title/twninfo36.htm> accessed 30 April 2021.
[171] ibid.

from developing nations, the level of agricultural subsidies in OECD countries grew higher after the AoA.[172] This evidences that the AoA has largely been unsuccessful in achieving its stated fairness objective as contained in the second preambular paragraph of the Agreement. While it is necessary to acknowledge that the AoA also attempts to embody some provisions that are people-centred with the perceived aim of protecting some groups of people from the harmful effect of its liberalisation policies, the implementation of such provisions is not effective enough to protect the livelihood and human rights of the vulnerable global population. For example, the SDT principle that is enshrined in all WTO Agreements, including the AoA, and seeks to grant more flexibility to developing and LDC Members, is often weak and less helpful. Reports have also shown that the provisions that require that special attention should be given to food needs of LDCs and net food-importing developing countries (NFIDC) have hardly been complied with, as LDCs and NFIDCs were increasingly forced to buy food on commercial terms, while their incomes were declining.[173]

Beyond the specific issues arising from the AoA, one also needs to consider the fact that most developing countries have also been locked into further liberalisation obligations under the World Bank and IMF's structural adjustment programmes and other free trade agreements.[174] Most of them have been pressured to lower their existing trade barriers and remove or drastically reduce their already limited subsidies under the aforementioned programmes, as conditions for loans or other aids.[175] On the contrary, developed nations are hardly subject to such obligations. This has left many developing countries little or no space to introduce trade policies to support their agricultural sector.

2.5. Conclusion

The crux of this chapter was to establish the asymmetric nature of the IEO and justify the dire necessity of fairness in the global economic system. As analysed in section 2.2 of this chapter, the global economic system has developed through various historical, ideological and political stages,

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[172] 'High Levels of Agricultural Support in OECD Countries: A Cause for Concern for Developing Economies - OECD' (n 164).
[173] Smaller (n 150) 7.
[174] Robert Lensink, *Structural Adjustment in Sub-Saharan Africa* (Longman 1996); 'IMF Conditionality' (*IMF*) <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality> accessed 30 April 2021.
[175] Kato Gogo, 'The Impacts of the World Bank and IMF Structural Adjustment Programmes on Africa: The Case Study of Cote D'Ivoire, Senegal, Uganda, and Zimbabwe' (2011) 1 Sacha Journal of Policy and Strategic Studies 110. *See also discussion on IMF and World Bank's Structural Adjustment Programme in 1.2.4 above.*

and those distinct but connected phases are relevant to any suitable investigation of the present state of the IEO. The modern IEO, which was heavily influenced by a set of neoliberal tenets has been advanced and dominated by some states, primarily consisting of past colonial powers. This economic system, according to several studies and scholarly opinions,[176] is unjust and continues to advance the dominance, interests and privileges of certain states to the disadvantage of others.[177]

It is evident that the management and policies of the IEIs contribute to the determination of the fortune and misfortune of the global populace and nations. Just as James also maintained, "the organization of the global economy is of the first practical significance for lives, countries and regions of the world".[178] Therefore, complaints about inequity and unfairness in the system cannot be left undiscussed. By explaining, in sections 2.3 and 2.4, the effects of the IEO and some of the key complaints emanating mainly from developing countries and LDCs, such as the issues concerning the AoA, SPS, DSU and even the negative effect of the SAP programmes, this section of the thesis concludes that the management of the IEO via the IEIs is inequitable and in many cases ruinous to a sizeable part of the world.

In furthering this point of view, Linrelli blames the injustice in the current economic order on the regimes of international law as a whole and their instrumental usage, having been rooted in the exploitation of distant peoples.[179] This alone explains the significance of the various efforts and ideas that are aimed at emancipating the so-called Third World from the consequences of that origin. This view also extends to the interests that international economic law and the IEIs were founded to serve,[180] as global fairness, inclusivity, sustainability, human rights and other social considerations are largely neglected and mostly classified as "non-economic realms". Global capitalism as practised under this system promotes the primacy of pure economic concerns and an obdurate commitment to profit at the expense of the aforementioned social values and concerns.

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[176] See for example: Stiglitz, *Globalization and Its Discontents* (n 1); James (n 1); Linarelli, Salomon and Sornarajah (n 1).
[177] Linarelli, Salomon and Sornarajah (n 1) 1.
[178] James (n 1) ix.
[179] Linarelli, Salomon and Sornarajah (n 1) 2.
[180] ibid 3.

This neglect explains why Kinley proposed "civilising globalisation" by demonstrating how and why human rights and the global economy should intersect rather than being at odds.[181]

Nevertheless, while the bald claims regarding the unfairness of the IEO are hardly unfamiliar to many, the most controversial subject among scholars and policymakers is usually regarding how fairness in the IEO should be perceived and realised. Different methodologies have been suggested in approaching the issue of fairness in the IEO. While some scholars have favoured a human rights approach, others prefer to approach the issue from the perspective of political/legal theories. Another group of scholars (known as TWAIL scholars) perceive the entire international legal system as objectionable and call for an inclusive system that will justly serve the interests of the entire global populace. The ultimate objective of this thesis is to explore the issue of fairness or equity in the IEO via a mixed methodological approach drawing from distributive justice, right to development, and TWAIL, as will be individually and collectively demonstrated in the subsequent chapters.

[181] David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge University Press 2009).

CHAPTER THREE

3.0. THEORETICAL AND NORMATIVE APPROACHES TO GLOBAL ECONOMIC FAIRNESS

3.1. Introduction

In the preceding chapter, this thesis analysed the historical background, asymmetric effect and some major criticisms of the IEO particularly from the perspective of developing countries, and consequently established the existence of unfairness in the IEO. Having done so, it therefore becomes necessary to explore theoretical and normative approaches that, in the opinion of this author, should be considered as first principles or primary guiding standards for policymaking in the global economic arena, particularly as it relates to the case study analysed in the latter part of this thesis. In achieving this, this research adopts three theoretical approaches from which five conceptual principles will be distilled in section 3.5, and through which the case study will eventually be appraised with the aim of providing proposals that may ameliorate the unfair status quo. It will also be argued in this chapter that a harmonised operationalisation of the three approaches, which are Global Distributive Justice, the Right to Development and TWAIL, is an essential missing link for realising the desirable level of fairness in the IEO.

The choice of these distinct, yet related approaches may be justified for a number of reasons. Firstly, the TWAIL approach is relevant due to the fact that a reasonable number of complaints against the policies of the IEIs and their unpleasant effects are in relation to the so-called “Third World” nations, which make up the majority of the developing and least-developed countries. TWAIL can also be justified if one carefully considers the fact that historically, as pointed out in section 2.2.4, most of the existing international institutions, including the IEIs, were not founded to function for the concerns of most Third World countries. More crucial is the fact that most Third World states historically had little say in the development of the international legal order in which they found themselves after overcoming the struggles of receiving recognition as sovereigns post-colonialism. As captured by Snyder and Sathirathai, the Third World methodology, therefore, serves as a scholarly medium to “reject, modify, and challenge some of the existing treaties, customs and general principles of international law developed by the former world community

which was dominated by the stronger 'civilized' nations of the world".[182] Due to its critical nature, the role of TWAIL, unlike the two other approaches in this research, will predominantly be a medium of critiquing the IEO, rather than a theory through which principles would be deduced.

On the other hand, distributive justice draws its relevance from its very nature, being a political/legal theory of justice that deals with the equitable allotment of goods, duties and privileges, in consonance with the merits or peculiarities of individuals and in the best interest of society at large. The modern reality of globalisation and global governance, therefore, demands global applicability of the theory, especially at this time when various social institutions are being used to make decisions that affect the global population. Specifically, issues concerning the distributive fairness in different WTO agreements, such as the AoA, SCM and SPS measures are of particular concern to most developing countries and LDCs as there are claims that they possess substantial competitive potential in the agricultural sector of international trade. Principles of global distributive justice can complement the critiques of the TWAIL approach by providing theoretical solutions to the problems the latter identifies.

Lastly, due to the need to mainstream the development concerns of those who are the most vulnerable to poverty and other basic social needs into legal and institutional practice of the IEIs, the right to development being a human rights approach serves as an appropriate framework through which relevant proposals can be drawn towards achieving a fair IEO that would uphold the primacy of development of the global populace.

The ambition of all three approaches is to offer a just alternative to the status quo. Nonetheless, each one of the three has its own limitation and criticisms. The objective of this chapter is, therefore, to analyse the three proposed complementary approaches with the aim of distilling practicable conceptual principles, which will later serve as the basis to evaluate, critique and provide proposals to the case study section, which focusses on the Agreement on Subsidies and Countervailing Measures.

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[182] Frederick E Snyder and Surakiart Sathirathai, *Third World Attitudes Toward International Law: An Introduction* (BRILL 1987) 3.

3.2. The Right to Development and International Economic Order

This section dwells on the concept of the right to development (RTD) and its intersection with the IEO. It also seeks to address the extent to which the RTD should be linked to the needed reforms in the IEIs and their policies in achieving global economic fairness. RTD is defined in Article 1 of the Declaration on the Right to Development (UNDRD) as an "inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised".[183]

The reason for exploring the RTD, among other relevant approaches, in relation to the IEO is due to public concerns regarding the social impact of modern economic globalisation, and the need for a fundamental shift from the prevailing profit and market-driven global economic system to a development-driven and human-centred system. As will be discussed later in this chapter, another key reason why this human rights approach is essential is because the institutional, legal and policy cultures of international human rights law and international trade law have always operated almost completely in isolation from each other. This is partly because, as a matter of international law, both regimes are primarily treaty-based, and there is generally a strong presumption against normative conflict.[184] Thus, except for some human rights norms such as those that have been elevated to the higher status of *jus cogens*, treaty-based human rights obligations and the WTO Agreements are of equal status and are generally understood to be unable to influence each other, except where there is a provision integrating such treaty into the WTO law. As such, it is crucial to explore how these regimes can evolve together by complementing each other in terms of operation. The statement of T.C. van Boven, a one-time director of the United Nations' Division for Human Rights, is relevant to this position. He said:

> It is a challenge of utmost importance, for unless we can effectively bridge the gap between the realms of human rights and economics we risk the pursuit, on the one hand, of an international economic order which neglects the fundamental human development objective

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[183] Declaration on the Right to Development, U.N. General Assembly Resolution 41/128, 4 December 1986 (hereinafter UNDRD).

[184] International Law Commission and Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission* (Erik Castrén Institute of International Law and Human Rights 2007) para 37.

> of all of our endeavours, and, on the other hand, of a shallow approach to human rights which neglects the deeper, structural causes of injustice, of which gross violations of human rights are often only the symptoms.[185]

Even though the idea of RTD is not novel and the adoption of the UNDRD by the UN General Assembly was over thirty years ago, the acceptance of RTD as a fundamental human right, that should influence policymaking, still remains a subject of political and academic controversy. While it was welcomed as a major breakthrough in the history of human rights in some quarters, some others have described it with various rather emotional terms such as distracting, mythical, an intellectual disaster,[186] and a dangerous ideological initiative.[187] The adoption of the UNDRD itself was either opposed or boycotted by a significant number of industrialised nations, thereby strengthening the claim of a political dimension to the issues surrounding the right, which has led to its relatively insignificant success in terms of implementation. In examining RTD in relation to the IEO, this section explores the background, sources, meaning, main principles, legal status, criticisms, obstacles affecting the implementation of RTD, and the relevance of RTD to the international trading system.

3.2.1. Background and Meaning of the Right to Development

The idea of the RTD emerged at the international level following the political wind of decolonisation around the 1960s. The idea was particularly articulated by the newly independent African states as a "necessary companion of their newly acquired political emancipation".[188] According to Balakrishnan, the post-1960s debate on the right revolved around issues that were identified by the advocating countries as "international barriers to development" such as:

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[185] Seminar on "The Effects of the Existing Unjust International Order on the Economies of the Developing Countries and the Obstacle that this Represents for the Implementation of Human Rights and Fundamental Freedoms" in ST/HR/SER. A/8, Annex II, p. 42. <http://legal.un.org/avl/pdf/ha/drd/ST-HR-SER.A-8.pdf> accessed 30 April 2021.
[186] J Whyte, "Review of Development as a Human Right" cited in Serges Alain Djoyou Kamga and Charles Manga Fombad, 'A Critical Review of the Jurisprudence of the African Commission on the Right to Development' (2013) 57 Journal of African Law 196, 200.
[187] Yash P Ghai and YK Pao, *Whose Human Right to Development?* (Commonwealth Secretariat 1989) 5–6, Cited in Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Bloomsbury Publishing PLC 2012) 2
[188] Noel G Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (2010) 22 Florida Journal of International Law 299, 299–300.

> [T]he lack of democracy at the international level and the resulting concentration of economic and political power of the North; the rigged rules of the system which worked against developing countries; the precarious condition of self-determination in developing countries; the lack of effective sovereignty over natural resources due to the aggressive interventionist policies of powerful countries; and the prevalence of structural conditions that prevented the state in the developing world from performing a more robust function in economic policy formulation, coordination, and implementation.[189]

Due to the above concerns, among others, voices comprising organisations, activists and scholars from within and outside the developing nations began to call for a change to the prevailing institutional and structural unfairness through the RTD. In the circles of legal jurists, one of the earliest expressions of RTD is often credited to Senegalese Jurist Keba M'Baye when he asserted in a 1972 lecture at the International Institute of Human Rights in Strasbourg that "every man has a right to live and a right to live better".[190]

Broadly, RTD became associated with two main agendas. The first is a demand for a "new international economic order" that is envisioned to be beneficial to the economic development of developing countries, and the second is the call for adherence to the view that peoples must have complete control over their natural resources and wealth. Hence, the objective of the RTD has always been about rectifying the existing wrongs in the IEO and to address the effects of the asymmetric relationship between the industrialised and developing nations. The right was originally envisioned as a collective peoples' right claimable against the international community as a whole (i.e., of an *erga omnes* nature).[191] However, the understanding of the RTD soon evolved to include an individual human right, thereby positioning both "all peoples" and "every human person" as holders of the right.

The central elements of RTD gradually developed via prominent pronouncements mostly in the late 1960s and 1970s. A major one was the declaration at the first ministerial meeting of the Group

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[189] Balakrishnan Rajagopal, 'Right to Development and Global Governance: Old and New Challenges Twenty-Five Years On' (2013) 35 Human Rights Quarterly 893, 899.
[190] Keba M'baye, 'Le Droit Au Développement Comme Un Droit de l'homme' (1972) 5 Revue des Droits de l'Homme 503. Cited in Bunn (n 187) 41.
[191] Villaroman (n 188) 300.

of 77 developing countries (otherwise known as the "Charter of Algiers") in 1967. Among other issues, the Charter stated that:

> The international community has an obligation to rectify these unfavourable trends and to create conditions under which all nations can enjoy economic and social well-being, and have the means to develop their respective resources to enable their peoples to lead a life free from want and fear.[192]

The next progress in the recognition of RTD occurred in 1977 when the UN Commission on Human Rights recognised the RTD as a human right and then recommended that the Economic and Social Council invite the Secretary-General to undertake a study on the international dimensions of the RTD as a human right "in relation with other human rights based on international co-operation, including the right to peace, taking account the requirements of the New International Economic Order and the fundamental human needs".[193] The Commission reaffirmed this recognition two years afterwards and added: "that equality of opportunity for development is as much a prerogative of nations as of individuals within nations".[194]

The debate on the RTD was thereafter formally elevated in the UN agenda after the creation of a Working Group of Governmental Experts in 1981. After a series of sessions by the Working Group, it adopted its report for transmittal to the Commission on Human Rights in December 1985. Eventually, the UNDRD was adopted at the 41st session of the UN General Assembly in 1986. According to Fukuda-Parr, the UNDRD is "the only international human rights instrument that addresses the need for joint international action to address the human rights consequences of global economic arrangements".[195]

The RTD, as formulated in the UNDRD, was reaffirmed in several international instruments including the World Conference on Human Rights held in Vienna in 1993. Both developing and developed countries present reached the consensus that the RTD is an inalienable and universal

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[192] Charter of Algiers (October 1967) <https://www.g77.org/doc/algier~1.htm> accessed 30 April 2021.
[193] UN Commission on Human Rights, Res. 4 (XXXIII), 21 February 1977.
[194] UN Commission on Human Rights, Res. 5 (XXXV), 2 March 1979.
[195] Sakiko Fukuda-Parr, 'The Right to Development: Reframing a New Discourse for the Twenty-First Century' (2012) 79 Social Research 839, 840.

right and an integral part of the fundamental human rights.[196] In follow-up to the Vienna Conference, the UN General Assembly established the Office of the High Commissioner for Human Rights (OHCHR) saddled with the responsibility to, among others, "promote and protect the realisation of the right to development and to enhance support from relevant bodies of the United Nations system for this purpose".[197] In an attempt to achieve this goal, several bodies (such as the UN independent expert on RTD, various Intergovernmental Working Groups and a High level Task Force on the implementation of the RTD) have been created and serviced by the OHCHR with the duty to interpret and analyse the scope and content of the UNDRD, as well as to recommend ways to tackle the challenges of its global implementation and realisation.

In 2000, world leaders present at the Millennium Summit pledged in the Summit Declaration, which later became known as the Millennium Development Goals (MDGs), to make the RTD a reality for everyone.[198] Following the expiration of the MDGs in 2015, core elements of RTD are also emphasised in its successor, which is the 2030 development agenda known as the Sustainable Development Goals (SDGs). There is no doubt that the development goals (MDGs and SDGs) are associated with the RTD, and that their realisation would go a long way in achieving the RTD. However, one must also note that there are restrictions to the SDGs' approach in terms of its practicality and the nature of obligations it imposes. This is because approaching development as a matter of fundamental human rights imposes more commitment from relevant actors, and it also attaches superior importance to development than a mere developmental programme that sometimes wears the appearance of charity that should only be committed to out of mercy. This thesis opines that a human rights approach to development is more practical and coercive in nature than a non-legally binding approach, notwithstanding the challenges that the RTD may be facing. This position was similarly expressed by Martin Khor at the Human Rights Council meeting held to commemorate the 30th anniversary of the UNDRD. He said:

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[196] Vienna Declaration and Programme of Action (June 1993) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> accessed 30 April 2021.
[197] 'A/RES/48/141, High Commissioner for the Promotion and Protection of All Human Rights' <https://www.un.org/documents/ga/res/48/a48r141.htm> accessed 30 April 2021.
[198] UN General Assembly, 'United Nations Millennium Declaration', UN Doc. A/RES/55/2, 18 September 2000, para. 11.

> The approach and instruments of the right to development would be useful to apply when implementing the SDGs. In turn, the fulfilment of the SDGs would be helpful for the realisation of the right to development. At the same time we should be mindful that there are limitations to the set of SDGs, and to the SDG approach. This should be supplemented by other instruments and approaches that are needed for a comprehensive understanding of the dynamics of development and thus of the right to development.[199]

Khor's reference to "other instruments and approaches" to supplement the SDGs could be inferred to mean human rights instruments and human rights-based approaches. In furthering the significant cause of the human rights approach, the UN Human Rights Council appointed a Special Rapporteur on RTD for a period of three years commencing from September 2016, with the mandate to "contribute to [the work of the Working Group on] the promotion, protection and fulfilment of the right to development in the context of the implementation of the 2030 Agenda for Sustainable Development"[200] and some other internationally agreed outcomes of 2015.[201] The Special Rapporteur is also required:

> To engage and support efforts to mainstream the right to development among various United Nations bodies, development agencies, international development, financial and trade institutions, and submitting proposals aimed at strengthening the revitalized global partnership for sustainable development from the perspective of the right to development.[202]

In September 2018, the UN Human Right Council at its 39th session adopted its annual resolution tasking the Intergovernmental Working Group on RTD with commencing "the discussion to elaborate a draft legally binding instrument on the right to development through a collaborative process of engagement, including on the content and scope of the future instrument".[203] The Chair of the Working Group was also asked to prepare a draft legally binding instrument "to serve as a basis for substantive negotiations on a draft legally binding instrument, commencing at its twenty-

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[199] 'South News: The Right to Development at 30: Looking Back and Forward' <https://us5.campaign-archive.com/?u=fa9cf38799136b5660f367ba6&id=3a9a00a980> accessed 30 April 2021.
[200] Human Rights Council, 'Resolution on the Right to Development', UN Doc. A/HRC/33/L.29, September 2016, para. 14(b).
[201] These agreements include the Sendai Framework for Disaster Risk Reduction, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development and the Paris Agreement on climate change.
[202] UN Doc. A/HRC/33/L.29 (n15) para. 14(c).
[203] Human Rights Council, 'Resolution on the Right to Development', A/HRC/RES/39/9, September 2018, para. 17(e).

first session".[204] This resolution was voted on, attracting 30 votes for, 12 against, and 5 abstentions. In a consistent voting pattern with other RTD resolutions, states from the Global South generally supported the resolution while most from the Global North did not.

The above provides an update on the development of the RTD at the UN level and also explains why the human rights approach to development is crucial. The RTD remains highly relevant to the concrete challenges to human rights in an integrated and unequal twenty-first century where globalisation is proceeding at a rapid pace.

3.2.2. Legal Foundations of the Right to Development

This thesis considers the legal formulation of the RTD beyond just the UNDRD, even though the Declaration is still crucial to understanding and achieving the right. It opines that some fundamental principles of the RTD are also expressed in some international treaties, which therefore also serve as the legal basis for the operationalisation of the right in international economic policymaking. As will be discussed later, this position will, perhaps, reduce the controversies as to whether the RTD should be considered as a binding right or not. This is because the issues concerning the implementation of the RTD are usually evaluated from the sole premise of the UNDRD, which appears to consistently generate political distractions.

Notwithstanding some of the earlier mentioned declarations and international instruments, it is reasonable to begin with the Charter of the United Nations as the first source of the legal formulation of RTD. Even though the primary objective of the Charter is for peace and security among its members, it nonetheless emphasises the importance of human rights and justice as a prerequisite for a stable international order. The preamble includes two references which hint at the connection between development and human rights. The first is the determination "to promote social progress and better standards of life in larger freedom", and the other is the resolve "to employ international machinery for the promotion of the economic and social advancement of all peoples".[205]

Beyond the preamble, specific relevant provisions of the UN Charter are Articles 55 and 56. Pursuant to these articles, the international community pledge themselves to take joint and separate

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[204] ibid. 17(f)
[205] Charter of the United Nations, Preamble.

action in cooperation with the UN to promote and facilitate the social and economic development of all nations and peoples, as well as to promote solutions to the international economic and social problems, and universal respect for human rights. Article 55 provides that the United Nations shall promote:

> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[206]

These provisions, even though often overlooked, are essential legal foundations of human rights and development, as they seek to create a condition of "stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".[207] Thus, even though no precise reference is made to RTD in the Charter, it establishes a legal basis for commitment to human rights and development.

About three years after the UN Charter came into force, the UN General Assembly adopted the Universal Declaration on Human Rights (UDHR). This path-breaking document in the UN history enjoined states to promote and respect identified rights and freedoms, and to secure their universal observance and effective recognition through progressive national and international measures. Provisions of the UDHR, such as Articles 22, 28, and 29, cover civil, political and economic concerns, which are relevant to this thesis.[208] Specifically, Article 22 provides:

> Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation

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[206] ibid. Article 55.
[207] ibid.
[208] Bunn (n 187) 32.

> and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[209]

The above provision shows that the UDHR anticipated the preparation of specific and binding human rights treaties to ensure the accomplishment of its economic and social objective. Subsequently, two separate human rights treaties materialised: the International Covenant on Civil and Political Rights (ICCPR)[210] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[211] The emergence of two separate treaties is due to the lack of political cooperation between the Western bloc fronted by the United States and the Soviet bloc, because of the ideological differences between the West and the Communist states. While the US-led bloc urged respect for civil and political rights but rejected the notion of economic and social rights, the Soviet bloc, on the other hand, emphasised the overriding importance of economic and social rights. Even though neither covenant explicitly mentioned the RTD, many of the principles contained in them, especially the ICESCR, are crucial to the understanding of the RTD.

It is essential to mention that efforts have also been made by some regional bodies in relation to the recognition and implementation of RTD, albeit at the regional level. Both the African Charter on Human and Peoples' Rights (also known as the "Banjul Charter")[212] and the Arab Charter on Human Rights recognise the right to development.[213] The former remains the only instrument that confers an individual and collective RTD with binding and enforceable obligations imposed on states. The African states, in the Preamble of the Charter, stated their conviction that:

> It is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Article 22 of the Charter further provides that "all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal

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[209] Universal Declaration of Human Rights (1948), Article 22.
[210] International Covenant on Civil and Political Rights, UNGA Resolution 2200A (XXI) (1966).
[211] International Covenant on Economic, Social and Cultural Rights, UNGA Resolution 2200A (XXI) (1966).
[212] African Charter on Human and People's Right, Article 22.
[213] Arab Charter on Human Rights, Article 37.

enjoyment of the common heritage of mankind", and that "States shall have the duty, individually or collectively, to ensure the exercise of the right to development". The African Commission on Human and Peoples' Rights (African Commission) has substantially developed the RTD jurisprudence and has, despite some objections, exemplified the operationalisation of the right in at least seven cases against various African states. For instance, in *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*,[214] the African Commission held that depriving the people of DR Congo to freely dispose of their wealth and natural resources, due to a regional military occupation by the respondent states, had violated their economic, social and cultural development, and therefore was in breach of Article 22 of the African Charter.

3.2.3. Substance of the Right to Development in the UNDRD

Notwithstanding the fact that the UNDRD may be insufficient to represent the entire idea of what constitutes the RTD, it is nonetheless the only existing UN instrument that is specifically dedicated to the right, and for that reason germane to understanding the material characteristics of the RTD. The UNDRD, which was adopted with 146 votes in favour, 1 opposing vote, and 8 abstentions,[215] has been criticised by even some of the advocates of RTD as vague and poorly drafted. This purported vagueness, as opined by Bunn, perhaps reflects the inherent complexity of the idea of the RTD.[216] Ian Brownlie also notes that the UNDRD's content reveals a problem of identity with the consequence "to perhaps blur the conceptual profile and make the task of promulgation of the right more difficult".[217] Regardless of the various conceptual criticisms, there is the need to understand that the UNDRD going by its content did not set out to be an exclusive instrument on the RTD. Just as the case of other legal and human rights fields, the commitment of all relevant stakeholders is still necessary for the development of RTD's jurisprudence through scholarly contributions, treaties and judicial interpretations. Article 10 of the UNDRD also clearly expressed that "steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and

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[214] *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*, (ACHPR 2003), Communication 227/99, <http://www.achpr.org/communications/decision/227.99/> accessed 30 April 2021.
[215] While only the United States voted against the UNDRD, Denmark, Finland, Germany, Iceland, Israel, Japan, Sweden and the United Kingdom abstained from the vote.
[216] Bunn (n 187) 107.
[217] Ian Brownlie, *The Human Right to Development: Study Prepared for the Commonwealth Secretariat* (Commonwealth Secretariat 1989) 11, as cited in Bunn (n 176) 107.

other measures at the national and international levels". It is for this reason that this section of the thesis will explain the nature and substance of the RTD as primarily conceived by the UNDRD.

The Preamble of the UNDRD makes clear from the inception of the document that it did not emerge out of the blue, and that its basis is well-grounded in existing international law instruments. It did so by cross-referencing the Charter of the United Nations, the UDHR, the ICESCR, the ICCPR and other relevant instruments under different provisions. It further defines "development" fairly comprehensively as:

> a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.[218]

While the concept of development, especially economic development, is often tinged with controversies in the contemporary discourse, the UNDRD carefully adopted an unrestrictive approach by recognising the multidimensional nature of development in its economic, social, cultural and political context. This is to reflect the varying developmental needs and levels of different countries. As Ansbach put it, "The UNDRD did not – and rightly so – draw a very definite picture of what development is … What is at stake here is the equal opportunity to develop, not an equal or identical development".[219] The UNDRD also sees development beyond a mere improvement in terms of growth in economic figures or other statistical measures by including non-material living standards of individuals in its definition. Of more importance to the economic fairness objective of this thesis is the UNDRD's inclusion of the notion of fair distribution of benefits and meaningful participation as a vital component of development. In general, this places development as both a process and a goal.

As mentioned earlier, the UNDRD describes the RTD as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental

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[218] UNDRD, Preamble.
[219] Tatjana Ansbach, 'Peoples and Individuals as Subjects of the Right to Development' in Subrata Roy Chowdhury, Erik Denters and PJIM de Waart (eds), *The Right to Development in International Law* (Martinus Nijhoff Publishers 1992) 157.

freedoms can be fully realised".[220] From the above definition and the content of the document, it is easily noticeable that the UNDRD has an anthropocentric outlook. This is evident, *inter alia*, in that it recognises "the human person as a central subject of development", the human being as "the main participant and beneficiary of development" as well as "the active participant and beneficiary of the right to development".[221]

It is important to point out that one of the major issues of controversy regarding the UNDRD, both in the UN debates and academia, has been the identification of the subjects of the RTD. Ian Brownlie describes the text, which makes different mentions of "every human person", "all peoples" and "all human beings … individually and collectively" and "states … individually and respectively", as an apparent confusion. He says:

> The confusion apparent in the text of the Declaration stems from the complex ancestry of an enterprise which is partly rooted in the tradition of human rights (the Universal Declaration and Covenants), partly in the developments concerned with the establishment of a New International Economic Order (the Charter of the Rights and Duties of States), and partly in the doctrine of collective rights (the rights of peoples) of which the right to development has been regarded an example in the literature.[222]

Nevertheless, this objection had earlier been voiced in the initial report of the UN on the RTD.[223] While citing the various instruments mentioned by Brownlie, the report justified the deliberate preference for a multistranded approach by maintaining that:

> [T]he enjoyment of the right to development necessarily involves a careful balancing between the interests of the collectivity on one hand, and those of the individual on the other. It would be a mistake, however, to view the right to development as necessarily attaching only at one level or the other. Indeed there seems no reason to assume that the interests of the individual and those of the collectivity will necessarily be in conflict.[224]

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[220] UNDRD Article 1.
[221] ibid. Preamble para. 13.
[222] Brownlie (n 217) 16–17.
[223] 'United Nations Report on the International Dimension of the Right to Development' (1979) E/CN.4/1334 <https://digitallibrary.un.org/record/6652/files/ECN.41334-EN.pdf> accessed 30 April 2021.
[224] ibid para. 85.

The UNDRD provides for a variety of duty holders, entailing both states and individuals. According to the UNDRD, all human beings have a responsibility for development by promoting and protecting an appropriate political, social and economic order.[225] However, states have "the primary responsibility for the creation of national and international conditions favourable" to the RTD,[226] and they are required to take steps, individually and collectively.[227] Some of the responsibilities required of states include duties to formulate suitable national development policies;[228] take resolute steps to eliminate massive and flagrant violations of the human rights of peoples and human beings;[229] take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights;[230] encourage popular participation in all spheres as an important factor in development;[231] and as catch-all elements, undertake all necessary measures for the realisation of the right to development[232] and ensure its full exercise and progressive enhancement.[233]

While these obligations apply to states both individually and collectively, the UNDRD also specifies a number of exclusively collective duties such as the duty to: cooperate in ensuring development and eliminating obstacles to development;[234] and the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.[235]

Overall, the RTD as formulated in the UNDRD represents a comprehensive framework and approach that aims to integrate aspects of both human rights and development theory and practice into the policies and programmes of all relevant actors. While the acceptability, implementation and progress of the UNDRD face many political obstacles, not least the fact that it is just a non-

[225] UNDRD, Article 2.2.
[226] ibid Article 3.1.
[227] ibid Article 4.1.
[228] ibid Article 2.3.
[229] ibid Article 5.
[230] ibid Article 6.3.
[231] ibid Article 8.2.
[232] ibid Article 8.1.
[233] ibid Article 10.
[234] ibid Article 3.3.
[235] ibid Article 4.

legally binding declaration, it could still be said that the Declaration has significantly developed a substantive vision in the form of the RTD, despite the fact that follow-up action is wanting.

3.2.4. Regional Interpretation of the Substance of the Right to Development

It could easily be observed from the analysis of the substance of the UNDRD in the section above that the text of the Declaration might be inadequate for proper appreciation of the RTD. It is for this reason that this section will further examine the substance of the RTD as perceived in another source. Particular focus will be on how the RTD has been interpreted by the African Commission on Human and Peoples' Rights. As pointed out in section 3.2.2, the African Charter enshrines the RTD as a binding and enforceable right on its members via Article 22, and it remains the only tested international instrument on the RTD with an evolving jurisprudence on the subject. It is for this reason that the perspective of the African Commission could serve as an inspiration for the operationalisation of the RTD at the global level, especially since the conceptual development of the right is strongly linked to the continent's jurists. This view of adopting the African regional understanding of the RTD as a model for advancing the right at the global level was also articulated by Oduwole, as she observed that:

> [T]he relevance of this regional right to analysis of the universal RTD lies in its contextual guidance regarding the original intent of the African developing country players who initiated this right at the regional level, as well as the continent's contribution in the area of jurisprudence on the RTD so far.[236]

The African regional human rights system has recorded key developments regarding both the conceptual and operational understanding of the RTD. As at 2021, at least 10 of about 240 decided decisions that had been rendered by the African Commission are relevant to the RTD. The RTD is either specifically involved as an issue in these cases, or it can be deduced from the issues, for instance, if they address relevant economic, social and cultural aspects of development. So far, the most celebrated decision of the African Commission on the interpretation of Article 22 of the

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[236] Olajumoke O Oduwole, 'International Law and the Right to Development: A Pragmatic Approach for Africa', *Inaugural lecture as Professor to the Prince Claus Chair in Development and Equity 2013/2015 delivered on 20 May 2014 at the International Institute of Social Studies, The Hague* (2014) 4.

African Charter, which is the main provision on the RTD is the *Endorois Case.*[237] This case is important in the development of the RTD at the African regional level because it was the first time that the African Commission extensively elaborated on the substantive nature and principles of the RTD and what its violation entails.

The case involved a complaint lodged by the Centre for Minority Rights Development, with the assistance of Minority Rights Group International and the Centre on Housing Rights and Evictions (which submitted an *amicus curiae* brief), on behalf of the Endorois community (an indigenous pastoral group in Kenya). The complaint is centred on the eviction of the Endorois people from their ancestral land, on which they had existed for centuries, by the Kenyan government to establish a national game reserve and tourist facilities. After the complainants had exhausted all internal remedies up to the Kenyan apex court without the desired result, they approached the African Commission, alleging several violations of the African Charter, including the RTD. They also alleged, *inter alia*, that the Endorois people's RTD had been violated as a result of Kenya's creation of a game reserve and the its failure to adequately involve the Endorois in the development process.

At the end of the process, the African Commission found that the Kenyan government had indeed violated the RTD of the Endorois indigenous people pursuant to Article 22 of the African Charter and other relevant international instruments. In reaching the verdict, the Commission clarified some important issues concerning the substance of the RTD by noting that:

> The right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.[238]

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[237] 'African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of the Endorois Welfare Council v. The Republic of Kenya*, Communication No. 276/2003, 25 November 2009' <https://www.achpr.org/sessions/descions?id=193> accessed 30 April 2021.
[238] ibid para 277.

The Commission further approved the Complainant's submission that there are fundamental elements that are required to be present before a policy can be said to have fulfilled the requirements of RTD. It states that:

> [T]he right to development requires fulfilling five main criteria: it must be *equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development*. In that regard it [the Commission] takes note of the report of the UN Independent Expert who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states "… the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available". Freedom of choice must be present as a part of the right to development.[239]

The Commission further expounded some of the above mentioned principles while reaching its decision. For instance, in rejecting the argument of the Kenyan government that some members of the Endorois community participated and were consulted in the decision-making process, the Commission clarified that mere participation or consultation is not sufficient to fulfil the participatory principle of the RTD. The nature of the participation has to be in good faith,[240] adequate and effective, and the standard of consultation has to be appropriate to the circumstances.[241] Effective and adequate participation, according to the African Commission, means that the concerned parties must be given the opportunity to shape the policies, and not just by imposing a decision on them after it has become *fait accompli.*[242] It particularly drew the attention of the Respondent to Article 2(3) of the UNDRD which guarantees "active, free and meaningful participation" of people in the process of development.[243] This principle is specifically relevant to the complaints of some developing and least-developed countries concerning the inadequate participation and lack of transparency during trade negotiations.

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[239] ibid paras 277–278 (emphasis added).
[240] ibid para 289.
[241] ibid para 281.
[242] ibid.
[243] ibid para 283.

Flowing from the above, the African Commission also held that the result of any policy (which could be interpreted in the broader sense to mean any governmental, regional or continental policy) must be for the improvement of the capabilities and choices of the people and not otherwise.[244] It, therefore, amounts to a violation of the RTD if a policy decreases the well-being of the people,[245] especially in the absence of a mutually agreed equitable sharing of the benefits made, which could be in form of compensation in the instant context.[246] Again, principles like this would be able to invalidate unfavourable policies of the IEIs that could have disastrous effect on people, such as the SAP already discussed in the previous chapter.

Another important principle to note from this case is how the African Commission discussed the need for an equal bargaining position while negotiating an agreement as a fundamental component of the RTD. The Commission held that the fact that the so-called representatives that the Kenyan government claimed to have consulted with were illiterates and could not have fully understood the terms of the agreement amounted to an unequal bargaining position and therefore fails to comply with the requirements of the RTD.[247]

While the *Endorois* case appears to be the most resourceful African Commission decision on the nature and substance of the RTD, there are few other cases decided by the same Commission which have also contributed to the jurisprudence of the RTD. In an earlier case between *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*,[248] the Commission emphasised the direct link between the right to wealth and natural resources and the RTD and linked those rights to the ability of states to fulfil their collective and individual obligations to achieve the RTD. The Commission held that:

> [T]he deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation - their right to their economic, social and cultural development and of the general

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[244] ibid.
[245] ibid. para 294.
[246] ibid paras 294 -296.
[247] ibid para 282.
[248] 'African Commission on Human and Peoples' Rights, *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, Communication No. 227/99, May 29, 2003' <https://www.achpr.org/sessions/descions?id=138> accessed 30 April 2021.

> duty of States to individually or collectively ensure the exercise of the right to development, guaranteed under Article 22 of the African Charter.[249]

The most recent opportunity that the African Commission had to interpret the RTD pursuant to Article 22 of the African Charter on merit was in 2016, in the case between the *Open Society Justice Initiative v. Côte d'Ivoire.*[250] This case served as an opportunity for the Commission to clarify the controversy on whether individuals can also allege a breach of a right to personal development. This was a debated issue because Article 22 of the Charter specifically mentions "peoples" as the holder of the right. In deciding this issue, the African Commission referenced some of its previous decisions on the RTD including the *Endorois* case, and also invoked some provisions of the UNDRD being "the most advanced political and legal recognition of the RTD at the international level" in clarifying its position as follows:

> [T]he Commission considers that there is indeed a fundamental convergence to comprehend the right to development as an inalienable, individual or collective right, to participate in all forms of development, through the full realization of all fundamental rights, and to enjoy them without unjustifiable restrictions. In any case, the conception of this right in the spirit of the Charter and the mere mention of the term "peoples" in the provisions of Article 22 of the Charter cannot adequately interpret the right to development as being solely and exclusively collective. In spite of its community emphasis, particularly with regard to the right to development, the Charter clearly recognizes the crucial role of the individual without whose self-fulfilment the development of the peoples may be compromised … [I]t is immediately recommended that the individual and collective right to development should be respected, protected and promoted.[251]

Another case that has consistently been referenced as a relevant example of the recognition of the scope of the RTD in the African human rights system is the case of *SERAC & Anor v. Nigeria.*[252]

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[249] ibid. para 95.
[250] 'African Commission on Human and Peoples' Rights, *Open Society Justice Initiative v. Côte d'Ivoire*, Communication No. 318/06, May 27, 2016' <https://www.achpr.org/sessions/descions?id=228> accessed 30 April 2021.
[251] ibid para 183.
[252] 'African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre & Anor v. Federal Republic of Nigeria*, Communication No. 155/96, October 27, 2001' <https://www.achpr.org/sessions/descions?id=134> accessed 30 April 2021.

Yet, this case appears like a missed opportunity for the Commission to expound on the principles of the RTD in depth, particularly in relation to economic and social development. This case was instituted by two non-governmental organisations on behalf of the Ogoni people (who live in an oil-producing region in the south-eastern region of Nigeria) against Nigeria, regarding contracts entered by the military government for oil exploitation on the Ogoni-land by Shell Petroleum. The complainants alleged that the many years of oil operations by Shell, via the facilitation and condonation of the Nigerian government, had caused several violations, including environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people. The Ogonis whose traditional occupation and main means of livelihood was fishing and farming also alleged that the oil development had poisoned much of the soil and water upon which they farmed and fished, and that the Nigerian government had destroyed and threatened their food sources through a variety of means. They also argued that the Ogoni people did not participate in the conclusion of the contract that deprived them of their lands and natural resources, and no benefit or compensation was given to them for the violations.

All the above issues represent legitimate violations of economic, social and cultural development rights, and the case could have served as the earliest opportunity for the African Commission to elaborate on the RTD jurisprudence, even before the *Endorois* case. However, while the Commission agreed with the complainants that various rights had been violated including the RTD, it merely mentioned the RTD while considering the violation of the right to food. Nonetheless, the fact that the right to food was linked to the violation of the RTD in the case could be taken as a relevant contribution to the interpretation of the right, even though unsatisfactory. Perhaps the many criticisms by legal commentators against how the Commission treated the RTD with less significance in this case, despite having been raised by the complainants, could have inspired their subsequent emphasis on the right.

From all the above, it can be deduced that the scope of the RTD at the African regional level is still evolving. Nonetheless, the interpretation of the RTD pursuant to Article 22 of the African Charter and other relevant instruments is instrumental in at least two ways. Firstly, it offers a more detailed conceptual understanding of the RTD. Secondly, for the purpose of enforcement, the system might serve as a clue for the advocates of a similar enforcement model at the global level.

The challenges, usefulness, limitations and achievements of the African model could also provide some critical thoughts for the support of an enforceable global treaty on the RTD.

3.2.5. Legal Status of the Right to Development

The determination of the legal status of the RTD is important because it is relevant to the prospect of the right being recognised and implemented. Despite the existence of multiple international instruments affirming the principles of the RTD, as already discussed in details under section 3.2.2, commentators are still divided as to whether these conclusively demonstrate the existence of RTD in international law. For instance, Roland Rich even though in support of the idea of the RTD, still opined that despite the passage of the UNDRD, the RTD remains a "putative right" which cannot be said to have been fully accepted into the body of international law.[253] Despite Rich's middle-way approach to the RTD, his support for the idea of the RTD has been criticised by scholars like Ian Brownlie as straying from the confines of positive international law.[254] Regardless of contrary opinions on the existence of the RTD as part of the international law, the 1979 Secretary-General's report had rightly expressed that an analysis of legal norms from various existing international law instruments and documents

> indicates that there is a very substantial body of principles based on the Charter of the United Nations and the International Bill of Human Rights and reinforced by a range of conventions, declarations and resolutions which demonstrate the existence of a human right to development in international law.[255]

This position was also reinforced by Philip Alston as he asserts that:

> It is appropriate to acknowledge that, as a general proposition in terms of international human rights law, the existence of the right to development is a *fait accompli*. Whatever reservations different groups may have as to its legitimacy, viability of usefulness, such doubts are now

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[253] Roland Rich, 'The Right to Development: A Right of Peoples?' in James Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988) 39.
[254] Roland Rich, 'The Right to Development: A Right of Peoples Special Issue: The Rights of Peoples' (1985) 9 Bulletin of the Australian Society of Legal Philosophy 120, 120–121.
[255] UN Report on the International Dimension of the Right to Development, para 78.

> better left behind and replaced by efforts to ensure that the formal process of elaborating the content of the right is a productive and constructive exercise.[256]

Considering all the above, the concern of this section is to briefly look into some of the issues surrounding the legal standing of the RTD. It is settled that the UNDRD, like most human rights instruments, is a mere resolution of the UN General Assembly which cannot be said to have any binding effect. While the General Assembly may take decisions that would be considered binding on matters concerning the internal management of the UN like budgetary resolution, the body is however only empowered to make recommendations in most matters. It has also been argued that the General Assembly resolutions, which are legally synonymous to declarations, are not included as part of the formal sources of international law as described in Article 38(1) of the Statute of the International Court of Justice. Nonetheless, this does not mean that such resolutions are to be ignored or deemed to have no value. According to a memorandum prepared by the UN Office of Legal Affairs, a 'declaration' in the United Nations' practice "is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration of Human Rights".[257]

This position supports the view that the UNDRD must be considered a serious undertaking. It is also instructive to recall that the UDHR, adopted in 1948, also took the form of a resolution of the General Assembly. Today, the UDHR is not only considered as the cornerstone of the international human rights system, but the principles it enshrines are also largely considered as customary international law.[258] This now leads us to the next phase of inquiry, which is: how may UN General Assembly resolutions which are primarily considered to be non-binding find their way to become a binding instrument under international law? The only realistic approach to this is to explore if the validity of the principles of such a resolution can be derived from traditional sources of international law. Among all sources, the most promising source with respect to the RTD is

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[256] Philip Alston, *Development and the Rule of Law: Prevention versus Cure as a Human Rights Strategy* (International Commission of Jurists 1981) 121.
[257] UN Report on the International Dimension of the Right to Development, p. 31, footnote 33, citing a memorandum prepared in 1962 by the UN Office of Legal Affairs.
[258] Louis B Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982) 32 American University Law Review 1, 15–16.

customary law. This has been asserted by Victor Umbricht, among several other legal scholars, even before the UNDRD. He said:

> The right to international development has become integrated in the thinking and practice of states … it has effectively passed into the reality of international custom and forms part and parcel of customary international practice which constitutes one of the sources of international law.[259]

However, Umbricht's claim is still required to be established using the two essential elements of customary international law. In determining the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice and whether such practice is accepted as law (*opinio juris*),[260] and each of the two constituent elements must be ascertained individually.[261] This is not an enquiry that this thesis intends to dwell on in depth, but it is worthwhile to briefly analyse existing views on the topic.

With regard to the first element, which is the practice of states, Bunn is of the view that there is nothing evidencing the existence of state practice in support of the RTD under customary international law,[262] and her argument is largely premised on her repeated claim that there is lack of precise understanding of what the RTD entails.[263] This thesis opines that this claim may not be entirely accurate regarding the RTD. While the claim could probably be justifiable regarding the content of the UNDRD which appears to be Bunn's primary focus, the objective of the RTD as a right that is primarily and specifically concerned with the economic, social and cultural freedoms of people is hardly ambiguous. Neither should the controversies surrounding the scope and extent of the RTD be a justifiable ground to dismiss the right as vague. Such controversies relating to the meaning and scope of legal concepts are not uncommon, even in relation to other human rights.[264] For instance, the fact that debates regarding euthanasia, the death penalty and abortion are greatly

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[259] Victor Umbricht, 'Right to Development' in R-J (ed), *The Hague Academy of International Law Colloquium on the Right to Development at the International Level* (1980) 97. Cited in Bunn (n 187) 131.
[260] Article 38(1) (b), Statute of the International Court of Justice. See also, Resolution on the Identification of Customary International Law, UN General Assembly Resolution 73/203, 20 December 2018, which adopted the International Law Commission's Draft Conclusion on the Identification of Customary International Law, A/73/10, 2018.
[261] (n, Annex, Part 2, Conclusion 3 (2).
[262] Bunn (n 187) 131–133.
[263] ibid.
[264] Crawford (n 253).

disputed by people of various interests under the right to life should not be taken as justification to reject the fundamental right as lacking "precise understanding". The most germane factor in the human rights jurisprudence is the objective it seeks to achieve, which in the case of the right to life is to preserve the sanctity of life, as in the case of the RTD, it is to guarantee the economic, social and cultural progression of people. Thus, other procedural or substantive issues regarding the right can be discussed on merit without necessarily affecting the primary substance or objective of the right.

Some authors have proposed promising perspectives on how state practice could be established in relation to the RTD. Roland Rich attempts to establish state practice based on the treatments accorded to developing countries.[265] Specific examples he explored in detail are: 1) the advancement of development is a major goal of international organisations to which most countries belong; 2) developing countries in some cases are treated as special subjects of international law; 3) nations behave as though they are under the obligation to provide development assistance; and 4) there is the consistent recognition of substantive inequality between developing and industrialised nations. These instances seem compelling in establishing state practice. However, the range of practices mentioned is quite limited when compared with the actual scope of the RTD. While it might be sufficient to justify preferential treatment for developing countries, the actual scope of the RTD extents to every nation and individual. Moreover, the principles of the RTD are not primarily grounded in the mere provision of developmental assistance. Nonetheless, Rich's analysis serves as a relevant starting point.

Similarly, FV Garcia-Amador proposed the possibility of establishing state practice through the duty to cooperate for development, as enshrined in various international instruments including the UN Charter. He maintains that such duty is correlative to the RTD.[266] He asserted that "focusing on the nature of such a duty … will throw light upon the question whether the right to development is, in fact, a genuine right".[267] However, the duty to cooperate can only establish a component of the RTD.

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[265] Rich (n 254) 126–128.
[266] Francisco V García Amador, *The Emerging International Law of Development: A New Dimension of International Economic Law* (1990) 60.
[267] ibid.

Another promising perspective which could be explored is to see whether state practice could be established through the provisions of the UDHR that affirm principles of the RTD, such as Articles 22 and 28. Since the UDHR is generally considered as part of customary international law, this might serve as an acceptable premise to establish state practice. It is understood that evaluating how state practice could support customary international law is enormously complex in legal interpretation. Nonetheless, the above perspectives expose that the RTD has huge potential of being established as state practice, through a dedicated study on the issue.

As for the second element, which is *opinio juris*, this thesis recognises that this might be challenging to establish due to the stringent condition attached to it. The main interpretation of this element is expressed by the ICJ in the *North Sea Continental Shelf Cases* as follows:

> Not only must the acts concerned amount to a settled practice, but they must also be settled, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[268]

While it could be argued that this condition is present for most African countries, because the justiciability of the RTD via the African Charter and judicial authorities is not in doubt, this most likely cannot be said concerning other countries. Even though the UNDRD has benefitted from a high degree of international consensus through its reiteration in annual resolutions and various forums, the narrow requirement for evidencing *opinio juris*, which requires a sense of obligation rather than merely committing to an action, presents a great hurdle.

Also, a rule of customary international law may not be applicable to persistent objectors, like the United States and its allies, who have consistently objected to most resolutions in relation to the RTD. This view was expressed in the most recent UN Resolution on the Identification of Customary International Law.[269] The only exception is if such rule of customary international law is considered a peremptory norm of general international law (*jus cogens*).[270]

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[268] North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*), I.C.J. Reports 1969, p.3 at 44.
[269] Resolution on the Identification of Customary International Law, Annex, Part 6, Conclusion 15 (1 & 2).
[270] ibid Conclusion 15 (3).

The idea of considering the RTD as possible *jus cogens* is relevant because it designates the right as a compelling norm from which no derogation is permitted by way of particular agreements or policy.[271] This is particularly relevant to the relationship between the RTD and international trade because other subjects of international law, such as international organisations and corporations, that are not directly mentioned under the UNDRD may become bound. Policies emanating from such organisations in the form of treaties would then have to be subject to the supremacy of the *jus cogens* rule. In arguing this position in relation to the RTD, Bedjaoui insists that the RTD, by its nature, is so incontrovertible that it should find its place in the doctrine of *jus cogens* from which no derogation is permitted. He premised his argument chiefly on the fact that the RTD flows from the right to self-determination and the duty of solidarity, which are "essential first and primary conditions from which flow the principles governing the international community".[272]

This thesis agrees with Bedjaoui with no reservations, but it is yet important to note that the understanding of the scope of *jus cogens* in international law is also controversial. As Ian Brownlie observes, "more authorities exist for the category of *jus cogens* than exists for its particular content".[273] However, certain legal commentaries and opinions of ICJ judges indicate that the UN Charter, freedom of high seas, international humanitarian law of armed conflict, the prohibition of the use of force,[274] and fundamental human rights form a significant part of the *jus cogens*.[275] However, opinions are divided on whether the RTD would be included in the list of fundamental human rights. Nonetheless, Bedjaoui's assertion which has also been expressed by some other scholars and experts seems to be keeping with the intention of *jus cogens.*

While this thesis is more inclined towards the view that there could be a strong basis for the RTD to be recognised as *jus cogens*, some authors have suggested that the RTD is at least a soft law.[276]

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[271] Article 53 and 64, Vienna Convention on the Law of Treaties.
[272] Mohammed Bedjaoui, *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 1184–1185.
[273] Ian Brownlie, *Principles of Public International Law* (5th ed, Clarendon Press; Oxford University Press 1998) 516–517.
[274] Bunn (n 187) 136.
[275] J Frowein, 'Ius Cogens' in *Max Planck Encyclopedia of Public International Law*, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1437> accessed 30 April 2021; See also, Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' [1988] Australian Year Book of International Law 82.
[276] Karin Arts and Atabongawung Tamo, 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?' (2016) 63 Netherlands International Law Review 221.

However, legal commentators do not seem to be in agreement regarding the concept of soft law. The term "soft law" has been described as lacking precision and misleading to some extent because it blurs the line between binding and non-binding norms.[277] In fact, it is unclear if it could be considered as an independent, formal source of international law. All the same, it still plays a valuable role in providing a legal basis for the development of binding legal principles. Moreover, most of what is referred to as "hard law" today finds its origin from the so-called soft law. For example, the ICJ in the *Nicaragua v United States*[278] looked more favourably upon soft law as the basis of *opinio juris* in establishing a norm under customary international law. Yet, this thesis is of the view that the category of soft law is not where the RTD is expected to be placed, considering the fundamental nature of the right, and the fact that the UNDRD has existed for over 30 years.

All the above arguments point to the evolving nature of international law, and how subsequent entrants into the international system are seeking to fit their concerns within the existing international order.

3.2.6. Relevance of the Right to Development to the International Trading System

From ancient times, there is a long-standing consensus among experts and non-experts that trade has one of the most significant links to human growth and all kinds of development. Trading has always supported livelihoods, improved the quality of people's lives, and even served as a major catalyst for innovations. Apart from the fact that it is arguably the strongest link between peoples and cultures, it also touches all facets of human development, from the most basic to the most sophisticated. The significance of trade to the development of communities is so enormous to the extent that it has consistently created frictions amongst nations as they compete to safeguard their various interests.

While the relevance of trade to the development of nations is agreed by almost everyone, the contemporary argument, albeit ironic, is whether the institutions overseeing the international trading system should be concerned with issues of development, poverty, human rights, and other social concerns – mostly termed as "non-economic values". For example, one writer maintains that the WTO "cannot and should not get involved with questions that have little to do with

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[277] Daniel Thürer, 'Soft Law' in *Max Planck Encyclopedia of Public International Law,* paras 36-37.
[278] The Republic of Nicaragua v. The United States of America (1986) ICJ Rep 14.

international trade" because it is not a development institution.[279] Without doubt, views of this nature only promote the philosophical understanding of profit and market growth as the ends of trade relations with little or no concern for its equitable nature and its impact on the living standards of people. Such views also go contrary to stated and implied values of the international trading system as affirmed, at least theoretically, by the WTO. It is in acknowledgement of this significant relationship between trade and development that the Marrakesh Agreement Establishing the WTO recognises that:

> [T]heir relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[280]

It is also relevant to mention that the Doha Round was specifically fashioned as the "Doha Development Agenda" or "Doha Development Round", with the stated aim to put the less developed countries at its heart. Even though the success of the Doha Round and how well the development concerns of developing countries have materialised is a different subject, the fact that development was the central purpose of the negotiating round emphasises how fundamentally inseparable trade and development are. The Doha Ministerial Declaration launching the Doha Development Round reads:

> We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.[281]

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[279] Zhen Kun Wang, *Coherence in International Economic Policy-Making: Integrating the Poor into the World Trading System* (Royal Institute of International Affairs 2001) 27.
[280] Preamble, first recital.
[281] Paragraph 6.

These kinds of affirmations appear repeatedly in many other trade treaties, which could serve as an indication of the global community's commitment to ensuring harmony between international trade and development. Nonetheless, while it could be rightly said that development is incorporated in the works of the WTO via some provisions in its Agreement, the premise of this thesis is that international trading rules are in fact unfair and constitute a major obstacle to the realisation of development. In addition, it was concluded by a UN task force that "the current international trading system is stacked against developing countries, a situation that severely hampers development and ongoing attempts to eradicate poverty".[282] This extends by implication to the RTD.

Moreover, specific provisions in the WTO Agreements that suggest the commitment of the organisation to development, such as the special and differential treatment provisions which implicate an underlying principle of the RTD, have often been criticised as imprecise and ineffective. Complaints of this nature led to the Doha Ministerial Declaration where it was agreed that "all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational".[283] Other negotiating concerns raised by developing countries as the agenda unfolded included the problem of protectionism via technical barriers, more market access, range of issues in the agricultural sector, issues surrounding investment liberalisation, issues relating to the intellectual property rights and so on.

In conclusion, the overall relevance of the RTD to the international trading system is that the principles of the RTD, as can be gleaned from various sources, represent the required ethical values and standards that trade and other economic activities should espouse. Principles such as equality, equity, transparency, accountability, reasonable and beneficial participation, non-discrimination, and the ultimate aim of improving the standard of living of the global populace should be embraced as the non-derogatory *grundnorm* of the policymaking process in the international economic system.

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[282] Report of a task force on Trade for Development, conveyed by The UN Millennium Project to conduct advisor work in support of the MDGs. Ernesto Zedillo, Patrick Messerlin and Julia Nielson, 'Trade for Development: Achieving the Millennium Development Goals' (UN Millennium Project 2005).
[283] WTO Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 20 Nov 2001.

3.3. Global Distributive Justice and the International Trading System

Justice can be described as "the constant and perpetual will to render to each his due".[284] However, variations of ideas exist as to its nature and scope, what it entails, and what matters should be considered relevant to its domain. In view of this, an important initial enquiry that should be addressed before going into detailed analysis about global distributive justice (GDJ) and its relationship with the international trading system is whether trade law is in need of any theory of justice in the first place. Justice theories as intended in this research refer to that branch of political/legal philosophy that is concerned with the allocative fairness of social institutions. This broadly entails a consideration of how resources, rights, privileges and opportunities are allocated among people belonging to a certain community or enterprise.

While it may appear as commonsense to a reasonable person that the regulations of any social institution ought to be guided by underlying principles that aim to guarantee a fair and equitable order within such institution, such assumptions are however often met with challenges emanating from different premises. For example, most "positive economists" will reject any economic analysis that is premised on the value of economic fairness, or what the economy should be or ought to be. This is similar to the approach of their counterpart in the legal realm (legal positivists) to matters of trade law or economic law in general. To proponents of economic positivism (as opposed to normative economics), economics should only be concerned with the description and explanation of economic phenomena (i.e. what is). Thus, economic value judgements (such as inequality, poverty, gender issues, distributive or allocative fairness, social welfare, morality or other ethical considerations) are often considered not to have a place within the scope of economics. Even though this thesis is clearly not in agreement with their position, this economic school of thought is alas dominant amongst contemporary economists and policymakers today.

It is important to note that this has not always been the case in the economic realm, as most leading economists in the first half of the 20th century devoted a significant part of their research to normative issues for the evaluation of public policies.[285] In lamenting the modern situation and "the strange disappearance of welfare economics", Atkinson wrote that "economists do not devote a

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[284] The phrase is said to have been popularised by Cicero in *De Natura Deorum* before it was later codified in the *Justinian Corpus of Civil Law*.
[285] Such as Hicks, Kaldor, Samuelson, Arrow, Pigou etc.)

great deal of time to investigating the values on which their analyses are based. Welfare economics is not a subject which every present-day student of economics is expected to study".[286] It is for the above reason that most expert analysis concerning international trade and other economic matters is usually more focused on the market and growing figures than other pertinent considerations such as human development.

Apart from the challenges from the perspective of contemporary positivist-economists, there are various objections to the application of theories of justice to international trade law even from within political/legal philosophers. Most of these objections are usually premised on the fact that most classical political theories have typically envisioned the application of their theories of justice through a domestic viewpoint. They mostly argue relying on different philosophical grounds that the international economic institutions lack the required underlying social structure for the application of any justice theory. For instance, some contractarians may argue that the perceived lack of "social contract" at the global level makes a global theory of justice impracticable. Communitarians may also argue that there is no global "community" of the sort that is required to trigger the obligation of global justice. Similarly, relativists may object to justice in the international trading system on the ground that there is no global normative consensus that really gives rise to transnational norms of justice.

The main problem with most of these objections is that they inaccurately assume that the social basis for global justice should necessarily be exactly the same as that of domestic justice. They also fail to take the nature and effects of modern globalisation into account in their theorisations. Taking the communitarians' objection as an example, the idea of a domestic political community as the ideal basis for the legitimacy of governance and justice might need to evolve considering the overwhelming changes in the global social relations and structure. Not only is the wealth distribution of nation-states now fundamentally conditioned by transnational and global institutions, but the understanding of domestic justice systems is also now inaccurate without reference to transnational and global institutions. A similar argument also applies to the contractarians' objection. While it is not intended to be argued in this thesis, as some others have

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[286] Anthony B Atkinson, 'The Strange Disappearance of Welfare Economics' (2001) 54 Kyklos 193, 195; I must mention here that this thesis does not intend to argue in favour of welfare based principles or utilitarianism, the reference to welfare economics here is only to provide an example of the large neglect of economic value judgments in general.

attempted, that the global economic structure entirely fits the necessary elements of the traditional social contract idea, it may still be appropriate to argue that global justice does not require a social contract of such nature and elements as the domestic model. Perhaps, the mere establishment of cooperation to create benefits and burdens and the arising need to decide on how they can be fairly allocated may well be sufficient for justice to apply from an improved lens of 'global' contractarianism.

Notwithstanding the various ideological oppositions to the relevance of justice theories in trade law and policy, justice theories are significant to international trade law for many important reasons. One key reason is that they can help to determine the proper objectives and values for policies in the international trading system, in accordance with a guided and well-reasoned understanding of what is helpful, fair, and just. Another reason is that they can serve as lenses to evaluate the fairness and unfairness in the treaties, regulations, governance and overall institutional structure of the IEO and the international trading system in particular. Lastly, and perhaps most importantly for lawyers and adjudicators, a theory of justice can play an important role in the interpretation of treaties and other legal documents. This is because of the need to resolve legal ambiguities and lacunae according to standards which are many times beyond the legal text that are primarily required to be interpreted, to guide legal reasoning and to serve as a justification for conclusions.

All the above have become crucial due to modern globalisation which has led to the proliferation and growth of IEIs along with their increasing subsidiary agencies. For the certain reason that the IEIs, which are forms of transnational governance, play a fundamental role in shaping the contours of the global economy and its resources, opportunities, and burdens, it is therefore much needed that their normative underpinnings, legitimacy and allocative effects be brought under the scrutiny of justice perspectives.

3.3.1. A General Description of Distributive Justice

Having provided a basis for the relevance of theories of justice to the international trading system in the preceding section, this thesis therefore adopts distributive justice theory as the most pertinent political/legal theory of justice for the reason already mentioned in section 3.1. Thus, this section will attempt to provide a broad description of distributive justice.

In a less technical way, distributive justice principles may be described as frameworks that are concerned with the allotment of goods, obligations, burdens and privileges, in consonance with the merits or peculiarities of individuals and in the best interest of society at large. These frameworks are important because of the role the resultant benefits and burdens play in affecting people's lives. According to Lamont and Favor, the principles of distributive justice are therefore best thought of as "providing moral guidance for the political processes and structures that affect the distribution of benefits and burdens in societies, and any principles which do offer this kind of moral guidance on distribution, regardless of the terminology they employ, should be considered principles of distributive justice".[287]

Distributive justice is to be distinguished from corrective justice because while the former is mainly concerned with a just distribution, the latter mainly addresses the deviations that may arise from such distribution. In relation to the international trading system as an example, it could be said that, while distributive justice theories are relevant to how the substantive rights and obligations imposed by the system are distributed, the latter is specifically related to the dispute settlement mechanism and how its remedies are administered.

Distributive justice principles differ in various dimensions according to different theorists. They differ in terms of the subject matters that are considered relevant to distributive justice (such as wealth, income, opportunities, development, welfare, utility, etc.); in terms of the objects or recipients of the distribution (such as individual persons, groups of persons, states, etc.); and the basis upon which the distribution should be made (such as equality, free transaction, according to individuals' peculiar characteristics, developmental needs, maximisation, gender concerns, etc.). These differences in approaches and methodologies, which lead to divergences among justice theorists, usually provide an avenue for opponents of distributive justice, from among professionals and policymakers, to dismiss the relevance of distributive justice literature as imprecise and lacking definite direction. But the fallacy in such dismissal is apparent as such debates about perspectives on issues, whether moral or empirical, exist in every other realm of knowledge. Moreover, such dismissal also suggests a misunderstanding of the nature of distributive justice, as it is impossible not to take a stand on the topic. In the context of this thesis,

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[287] Julian Lamont and Christi Favor, 'Distributive Justice' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2017, Metaphysics Research Lab, Stanford University 2017).

for example, any opinion in support or against the current operation of the IEO still amounts to taking a substantive position on the distributive nature of the existing system, because the views are still concerned with what qualifies as the appropriate order, and instruct the IEIs on how allocative decisions should be made. Some authors have taken the view that such objectors to distributive justice in trade matters on the insistence of "no theory of distributive justice" are best classified somewhere between "egoists" and "utilitarians" within the theoretical classifications.[288] While the former may simply refuse to consider trade through the lens of justice because the order seems favourable to their position, the latter, in their economic version, insist that trade policies should only be judged by its effect on efficiency and "aggregate welfare".[289] Garcia best sums up both positions as follows: "I am in the winner's position in the aggregate welfare calculus, so it is best to keep the whole conversation of justice off the table – it isn't going to improve my position".[290]

Notwithstanding the unending debates, the primary concern of this thesis is the distributive principles designed to cover the distribution of the benefits and burdens of economic activities, particularly in relation to international trade law. Among various contending theories of distributive justice, this thesis favours a reformed adaptation of John Rawls's "Justice as Fairness" theory as one of the normative models for the discussion on global justice and the international trading system.

3.3.2. Why Rawls's Theory of Distributive Justice?

Rawls's theory as the choice of this thesis can be justified on numerous grounds. Firstly, his theory of justice is founded on the general framework of liberalism. Adopting the understanding of Waldron, a major characteristic of liberalism as a form of justification is its assertion that the consent of every person in any political order is essential for such an order to have legitimacy.[291] This best suits the analysis of the current international trading system whose policies are largely influenced by states that consider themselves Western-style liberal democracies. Therefore, an

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[288] Frank J Garcia, 'Why Trade Law Needs a Theory of Justice' (2006) 100 Proceedings of the ASIL Annual Meeting 376, 378.
[289] Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1988) 276-278: Raz attempted justifing how an extra lick of an ice-cream for the trivial satisfaction of a sufficiently large majority can justify the killing of a person based on utilitarianism.
[290] Garcia, 'Why Trade Law Needs a Theory of Justice' (n 288) 378.
[291] Jeremy Waldron, 'Theoretical Foundations of Liberalism' (1987) 37 The Philosophical Quarterly (1950) 127, 140.

analysis of justice that is rooted in liberal philosophical values may be a more persuasive tool to justify the proper integration of appropriate distributive justice principles into international trade policies as an ethical obligation upon the most influential parties involved.

Secondly, among the different strands of liberalism, Rawls' theory is also founded on egalitarianism, as opposed to utilitarianism and libertarianism. This particularly suits the objective of the thesis because of the theory's "liberal" commitment to "equality". Other scholars such as Dworkins have also argued that the idea of equality is very central to liberalism, even more than ideas such as liberty.[292] Therefore, if it is accurate that equality is central to liberalism, it goes without saying that Rawls's "Justice as Fairness" theory being the leading liberal-egalitarian theory of justice is an appropriate starting point for this enquiry.

3.3.3. Preliminary Issues on Justice as Fairness

The issue of inequality is central to Rawls's theoretical enterprise, and the principal work in which he laid down his response to inequality is his famous book *A Theory of Justice*.[293] The theory he set forth in the book was named "Justice as Fairness", and it will substantially form the basis of this thesis's view on distributive justice. It may be worthy to mention that Rawls further developed aspects of his justice as fairness in two subsequent books – *Political Liberalism*[294] and *The Law of Peoples*.[295] The former is not so much relevant to the discussion in this thesis as it mainly relates to the structure of political liberty and discourse, as opposed to the distributive aspect of justice as fairness. The latter is however relevant to this thesis because Rawls presented his opinion on the applicability of justice as fairness to international relations – a view that will form the basis of discussion in section 3.3.5.

In understanding justice as fairness, two preliminary issues need to be clarified. The first is that Rawls is concerned about the inequalities that arise with respect to the distribution of what he described as "primary goods".[296] He described primary goods as "things that every rational man is presumed to want" or things that would "normally have a use whatever a person's rational plan of

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[292] ibid 129, citing Ronald Dworkin, *A Matter of Principle* (Oxford 1985).
[293] John Rawls, *A Theory of Justice* (Oxford University Press 1972).
[294] John Rawls, *Political Liberalism* (Harvard University Press 1993).
[295] John Rawls, *The Law of Peoples* (Harvard University Press 1999).
[296] Rawls, *A Theory of Justice* (n 293) 62.

life".[297] He further divides primary goods into two basic varieties, namely "social primary goods" and "natural primary goods". Rawls theory is particularly interested in the former. Social primary goods are goods that are directly at the disposition of the "basic structure of society" such as "rights and liberties, powers and opportunities, income and wealth",[298] while natural primary goods are defined as those goods that are not subject to the basic structure because of their natural nature. Examples are "health and vigor, intelligence and imagination".[299] He, however, claims that the possession of natural primary goods can still be influenced by the basic structure.[300]

The second issue that needs to be clarified is that, according to Rawls, the justice as fairness theory is primarily applicable to what he termed "the basic structure of society",[301] which he described, in turn, as "the arrangement of major social institutions into one scheme of cooperation".[302] He elaborated many years afterwards in *Justice as Fairness: A Restatement* that his theory is concerned with the "the basic structure of society, that is, its main political and social institutions and how they fit together into one unified system of social cooperation".[303] He also explains that "these principles are to govern the assignment of rights and duties in these institutions and they are to determine the appropriate distribution of the benefits and burdens of social life".[304]

3.3.4. The Two Principles of Justice as Fairness

By way of initial summary, *Justice as Fairness* has two principles, and the central idea of the two principles is that all social primary goods, which consist of income and wealth, liberty and opportunity, and the basis of self-respect, should be distributed equally unless an unequal distribution is to the benefit of everyone, especially the least favoured.[305] The theory also describes injustice as inequalities that are not to the benefit of all. Rawls contends that a proper application of the principles is capable of bringing about an adequately just system of distribution of social

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[297] ibid.
[298] ibid.
[299] ibid.
[300] ibid.
[301] ibid.
[302] ibid 54.
[303] John Rawls, *Justice as Fairness: A Restatement* (Erin I Kelly ed, 2nd edition, Belknap Press: An Imprint of Harvard University Press 2001) 39–40.
[304] Rawls, *A Theory of Justice* (n 293) 54.
[305] ibid 303.

primary goods, and would fulfil the Kantian obligation of mutual respect, to treat each other as ends and not as means.[306] The two guiding principles of Rawls' theory are as follows:

> **First Principle:** Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> **Second Principle:** Social and economic inequalities are to be arranged in order to satisfy two conditions: (a) They are to be attached to offices and positions open to all under conditions of fair equality of opportunity, and (b) They are to be to the greatest benefit of the least-advantaged members of the society.[307]

The first principle is related to equal basic liberties and freedom, and the second principle applies mainly to economic institutions. The second principle will be the primary concern of this thesis, because of its clear implications for assessing the distributive justice of the international trading system and its institutions. Therefore, much emphasis will not be placed on the first principle because it is not commonly considered a principle of distributive justice given that it does not relate to the allocation of economic goods strictly speaking – even though still related and fundamental. I will nonetheless briefly provide an insight into the first principle before going into the details of the second, because the fulfilment of the first principle, according to Rawls, takes priority over the second, just as 2(a) has lexical priority over 2(b).[308]

Rawls's first principle affirms that citizens should have the basic rights and liberties, such as the freedom of speech, right to vote, liberty of conscience and freedom of association, right to be treated in accordance with the rule of law, and so on. This principle accords these rights and liberties to everyone within the basic structure equally. This is usually a concern of domestic constitutional orders – and if stretched to the international level, it is also relevant to the concerns of international human rights law and international criminal law regimes.

Unpacking the second principle, which is our main concern here, it itself contains two sub-principles – the fair equality of opportunity principle (2a) and the difference principle (2b). The

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[306] ibid 179.
[307] ibid 302.
[308] ibid.

fair equality of opportunity principle essentially provides that factors that result in social and economic inequalities, such as educational and economic opportunities, must be equally opened to every individual of equal talents, abilities and motivations, regardless of whether they were born rich or poor.[309] This presents an egalitarian starting point. However, unlike in strict egalitarianism where a radical or absolute kind of equality is usually canvassed, the difference principle provides a different path.

The difference principle, which is the second part of the second principle, is ethically motivated by the idea of "equal respect for persons"[310] and the ideal of deep social unity. The principle is primarily concerned with the distribution of income and wealth. The main crux of the principle is that, while equality in distribution of wealth and income should be the primary standard, inequality should, however, be considered as fair, provided that it is to benefit everyone, especially the worst-off group or the least advantaged. The goal of the difference principle is to ensure that people in a privileged position do not get richer at the expense of the less fortunate. The principle ensures that a person does not merit more of a social good just because of his natural endowment or skills. While it is not arguing for everyone to be allotted the same share, its main point is that natural abilities can be utilised to make everyone better off. Rawls contends that a principle that permits some citizens advantages that do not benefit the worst off in the society suggests that the latter are not equally worthy members of society.

3.3.5. Debates on the Global Applicability of the Difference Principle

Rawls's theory of distributive justice, especially the difference principle, has been one of the most influential works in modern political philosophy. This is mostly due to its liberal approach to equality and particularly its justification of a kind of inequality for the betterment of the situation of the least privileged in the economic distribution scheme. The prominence of this theory has therefore exposed it to numerous appraisals. As it has been adopted as the basis to justify many policies and academic arguments, so have aspects of it also been the subject of different criticisms.

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[309] Leif Wenar, 'John Rawls' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2017, Metaphysics Research Lab, Stanford University 2017).
[310] Lamont and Favor (n 287) 6.

This thesis, as some others have previously done, finds the second principle of justice as fairness largely relevant to the distributive problems of the modern IEO.

However, the first obstacle in the adaptation of justice as fairness to the international economic regime is that Rawls himself had famously argued against the application of distributive justice theory (especially his difference principle) globally. He stated that "I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies".[311] This view was further expounded in his book *The Law of Peoples*,[312] which came about 28 years after the publication of *A Theory of Justice*. He contended that there cannot be a global difference principle, as distributive justice can only apply among what he described as "well-ordered societies" under the basic structure as opposed to "burdened societies", which include most of the developing world.[313] This demonstrates that like many other traditional political theorists, Rawls also mostly conceives the applicability of distributive justice only within domestic boundaries. As Nagel puts, "the ideal of a just world for Rawls would have to be the ideal of a world of internally just states".[314] Rawls, however, loosely mentioned that the so-called well-ordered societies have a "duty of assistance" to the burdened societies.[315] The import of this duty seems ambiguous, but it is unmistakably not an attempt to justify distributive justice in the economic relationship among states. According to Rawls, the main problem of the so-called burdened societies is not resources or wealth distribution, but their social and political attitude. He said:

> I believe that the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues.[316]

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[311] Rawls, *A Theory of Justice* (n 293) 8.
[312] Rawls, *The Law of Peoples* (n 295).
[313] ibid 4-5; 115-120.
[314] Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Philosophy & Public Affairs 113, 115.
[315] Rawls, *The Law of Peoples* (n 295) 106.
[316] ibid 108.

The above quote seems appealing and substantially accurate for the motivation of appropriate state policies for national development; but not so much attractive if considered in the general context of *The Laws of Peoples* which focuses on justice in international relations. This only serves as a distractive justification to ignore empirically established global economic inequalities and the various legitimate distributive irregularities that are inherent in the IEO. Even though Rawls acknowledges the existence of negotiated international arrangements for economic matters such as trade and finance in various parts of the book, he however conveniently ignores the extent of their influence and effect on the economic and political lives of domestic societies.

Rawls's view on global distributive justice has been subject to intense debate, and it will be considered as the antithesis of this section. This thesis will be most inclined towards the general cosmopolitans' approach to global justice which holds that no consistent logical argument can be sustained to limit the applicability of distributive justice to a certain domain and to the exclusion of the entire global community. The cosmopolitans' view on global distributive justice, in opposition to the nationalists, can be justified on both theoretical and factual grounds. In Pogge's *World Poverty and Human Rights*, he, on the basis of moral universalism, faults Rawls's failure to extend the application of the difference principle to the global economic order. He claims that Rawls runs afoul of moral universalism because "he fails to meet the burden of showing that his applying different moral principles to national and global institutional schemes does not amount to arbitrary discrimination in favor of affluent societies and against the global poor".[317]

Adopting Rawls's idea of the "basic structure" in *A Theory of Justice*, Buchanan was able to demonstrate that a global basic structure actually exists, in rejecting the limiting approach.[318] According to Rawls's own definition, the basic structure is to be understood by the nature of their distributional effect, and he described it as "the way in which the major social institutions [which include major economic and social arrangements] distribute fundamental rights and duties and determine the division of advantages from social cooperation".[319] This basic structure, according to Rawls, is the "primary subject of justice because its effects are so profound" and "the major institutions define men's rights and duties and influence their prospects, what they can expect to

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[317] Thomas Winfried Menko Pogge, *World Poverty and Human Rights* (Polity Press in association with Blackwell Publishers 2002) 108.
[318] Buchanan (n 18) 700.
[319] Rawls, *A Theory of Justice* (n 293) 7.

be and how well they can hope to do". It is, therefore, mystifying how the above description has failed to fit the distributional effects of the global economic institutions, which is a form of transnational governance with distributive capacities of global goods. Buchanan asserts that the global basic structure exits, and it is composed of:

> [R]egional and international economic agreements (including General Agreement on Tariffs and Trade, North American Free Trade Agreement, and various European Union treaties), international financial regimes (including the International Monetary Fund, the World Bank, and various treaties governing currency exchange mechanisms), an increasingly global system of private property rights, including intellectual property rights that are of growing importance as technology spreads across the globe, and a set of international and regional legal institutions and agencies that play an important role in determining the character of all of the preceding elements of the global basic structure.[320]

The main point of all the above is that in a character similar to the domestic basic structure, a global basic structure also exists, which effectively determines the prospects of individuals, groups, including peoples as conceived by Rawls. Buchanan concludes that:

> [i]t is therefore unjustifiable to ignore the global basic structure in a moral theory of international law—to proceed either as if societies are economically self-sufficient and distributionally autonomous (so long as they are well-governed) or as if whatever distributional effects the global structure has are equitable and hence not in need of being addressed by a theory of international distributive justice.[321]

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[320] Buchanan (n 18) 705–706.
[321] ibid 706.

Other cosmopolitan theorists from within liberal-egalitarianism such as Beitz and Pogge[322] also agree that a global basic structure exists, and Rawls's justice as fairness theory including the difference principle consequently applies to the global economic order.

Beyond the theories and from a practical perspective, globalisation itself which has given rise to global governance necessarily creates the need for a global distributive theory of justice – at least to the extent of those aspects of international relations that have been empirically confirmed to affect the lives of people. The growing integration of individual states' economies into a global one means that nations are increasingly affected by the policies and happenings in other states. States can now hardly be described as absolutely independent of the others to such extent that they can autonomously implement their own justice principles, as internal situations are now heavily affected by international factors. As Beitz says:

> [I]t is not even clear that the question is intelligible as it arises for contemporary developing societies which are enmeshed in the global division of labor: a society's integration into the world economy, reflected in its trade relations, dependence on foreign capital markets, and vulnerability to the policies of international financial institutions, can have deep and lasting consequences for the domestic economic and political structure. Under these circumstances, it may not even be possible to distinguish between domestic and international influences on a society's economic condition.[323]

In general, while it might be understandable for Rawls, being an academic philosopher in the 1970s, not to take the effects of the modern economic globalisation and other developments in international economic relations into consideration, it is certainly not tenable today, as the requisite level of relationship has emerged at the global level to sustain an argument in favour of distributive justice.

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[322] Charles R Beitz, *Political Theory and International Relations* (Princeton University Press 1999); Thomas Winfried Menko Pogge, *Realizing Rawls* (Cornell University Press 1989).
[323] Charles R Beitz, 'Rawls's Law of Peoples' (2000) 110 Ethics 669, 690.

3.3.6. The Difference Principle and the WTO Law

For the reasons already discussed in the previous section, this section will proceed to consider the adaptability of the justice and fairness theory, particularly the difference principle in international trade relations. Garcia has produced extensive works on how Rawls's distributive justice principles could be adapted to IEL. He claims that such adaptation will require three elements, which are: (a) establishing the facts of the existence of inequality; (b) examination of the choice of problem faced by those in the original position; (c) and an identification of the principles of justice which result.[324] All three elements were adequately established by Garcia.[325] Thus, combining Rawls's justice as fairness which is rooted in liberal-egalitarianism, and the cosmopolitans' vision of global distributive justice, Garcia suggested a principle of "international difference principle" as follows: "International social and economic inequalities are just only if they result in compensating benefits for the least advantaged states".[326]

Since the focus of this thesis is on international trade law, it will be appropriate to conclude by demonstrating, with a few practical examples, how relevant the difference principle is to the WTO law and practice. There will be no need to restate the arguments on how the WTO and other IEIs meet the requirement of an international basic structure based on the Rawlsian model, and how they possess the institutional capacity to distribute benefits and burdens relating to global goods among states. Such facts have become incontrovertible by modern realities. In fact, the WTO's distributive mandates for allocative decision-making, and even the enforcement of resulting norms, continue to increase in scope.[327] The policies of the institution many times regulate and affect domestic policies, as they effectively control the terms of market access and the enforceability rights relating to intellectual property and investment. These policies directly affect the wealth of states and their people. Thus, even though a justifiable difference exists between domestic and international institutions for some reasons, both still share the same basic predicate with regards to the applicability of distributive justice theory, being that they involve the creation and allocation

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[324] Garcia, 'Justice, the Bretton Woods Institutions and the Problem of Inequality' (n 8) 11.
[325] Frank J Garcia, 'Trade and Inequality: Economic Justice and the Developing World' (1999) 21 Michigan Journal of International Law 975.
[326] Garcia, 'Justice, the Bretton Woods Institutions and the Problem of Inequality' (n 8) 14.
[327] An example is the development on fisheries subsidies negotiation under the WTO.

of benefits arising from social cooperation. In fact, these institutions now make it questionable if any society can actually be called a closed society anymore in the Rawlsian sense.

In applying the above international difference principle to trade law, one can suggest that, for international trade law to be just, it needs to operationalise the difference principle by making inequalities work for the benefit of the least advantaged in the scheme. In the context of the existing principles under the WTO Agreements, one can relate the international difference principle to the SDT provisions. The purpose of SDT provisions which are contained in the WTO Agreements is to "give developing countries special rights and … give developed countries the possibility to treat developing countries more favourably than other WTO Members".[328] However, as earlier discussed in section 2.4.2, while illustrating the inequities of the SPS Agreements, SDT provisions mostly suffer from serious pragmatic and normative problems. In other words, they are commonly ineffective and can hardly be relied upon for different reasons. In some cases, SDT provisions employ purely hortatory language that relegate the effect of the provisions to a mere moral persuasion that confers no actual directive or obligation. An example is the first paragraph of the Enabling Clause which states that "contracting parties *may* accord differential and more favourable treatment to developing countries".[329] Such elective expression will hardly be given a binding effect by the adjudicatory bodies. Even in some instances where mandatory terms such as "shall" are used, the lack of specificity on how the provision should be complied with, or the adoption of neutralising clauses, often render such provisions unenforceable.[330]

In essence, the difference principle can, in addition to practical and empirical enquiries, serve as a normative tool to evaluate if the SDT provisions relating to market access, domestic policies of developed states, or other trade policies actually operate to make inequalities work in such a way that it benefits every state, especially the least advantaged states.

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[328] 'WTO | Development - Special and Differential Treatment Provisions' <https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm> accessed 30 April 2021.
[329] GATT, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ('Enabling Clause'), Decision of 28 November 1979, L/4903, BISD26S/203.
[330] A relevant example has been discussed in section 2.4.2 where the Panel, in *EC-Biotech*, held that Article 10.1 of the SPS Agreement in unenforceable due to its lack of specificity.

3.4. The International Trading System from a Critical Third World Approach

Being one of the theoretical lenses adopted in this thesis, this section briefly provides an overview of the TWAIL, particularly as it relates to the international economic system. It describes the nature of the critical methodology, its central themes, and further justifies its relevance in the international economic governance. The significance of a Third World approach in analysing the global order cannot be overemphasised, because the dominant perception of the so-called Third World nations about the regime of international law, especially the IEL, is that its existence is mainly to sustain the historical domination of the powerful developed countries over others. It is, however, essential to be mindful that, while TWAIL could be unreservedly critical of the present global system, it still acknowledges that the way out of the established hierarchical and inequitable order can only be achieved through a reformed international legal system. Thus, the following subsections will provide more understanding of the discussion.

3.4.1. General Background and Nature of TWAIL

The mainstream attribution of universality, neutrality, objectivity and fairness in describing the nature of the contemporary international legal system has never been well-received by several critical scholars of various interests. It is against this mainstream understanding that some scholars have been more devoted to critical international legal scholarship. The centrality of such diverse scholarship is to adopt critical methods and theories to deconstruct, demystify and disrupt dominant narratives, interpretations, and how legal phenomena are understood. Critical international legal scholars mostly adopt a socio-legal lens in presenting alternative viewpoints to how we perceive the law and the world around us, through doctrinal, empirical, historical and interdisciplinary methodologies to legal studies. They are opposed to the absolute positivist approach adopted by other legal scholars, which overemphasises formalism or rule-centred doctrinal specificity while rejecting the significance of coherent abstraction.[331] Examples of critical approaches to international legal scholarship (some of which are classified as post-modernism)[332] include the feminist approaches to international law (FtAIL), new approaches to international law

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[331] Nigel Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 Harvard International Law Journal 81, 83.
[332] Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 Eur. J. Int'l L. 66.

(NAIL), and TWAIL. Among the various competing and complementary critical approaches, this thesis only intends to focus on TWAIL and demonstrate its relevance to IEL.

TWAIL has been conceptualised in various ways. It has been described as a theory, a methodology, a community of scholars; a project; a decentralised network; a political movement; a set of approaches; a school of thought; and several other descriptions.[333] It may nonetheless be safer to simply define TWAIL as an approach to international legal scholarship that attempts to critically engage the mainstream claims of universality, justness and impartiality that are usually associated with international law, especially as they concern the Third World. Through a critical understanding of international law's history, structure and process, TWAIL scholars attempt to analyse international law from the context of the lived experiences of ordinary people of the Third World, with the aim of transforming the system into "an international law of emancipation".[334] This is because TWAIL scholars unanimously characterise international law as carrying forward the legacy of its imperial, colonial, and Eurocentric foundations, notwithstanding the fact that it guarantees sovereign equality in principle.[335] For instance, Mutua, among others, strongly opines that the international legal system is a "predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West".[336]

While TWAIL as a coinage was introduced as an intellectual movement at Harvard Law School in the mid-1990s, the idea that characterises TWAIL had been in existence for decades. TWAIL scholars typically trace the background of TWAIL, as a political idea and movement, from the Bandung Afro-Asian Solidarity Conference of 1955. It was the period that saw the surge of anti-colonial/decolonisation movements across Latin America, Africa and Asia after World War II. The Bandung Conference, which took place in Indonesia, was convened to create a coalition of

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[333] *For example, see:* Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 International Community Law Review 371, *where he engaged the question whether TWAIL is a theory, methodology, or both*.

[334] BS Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach Feature' (2007) 8 Melbourne Journal of International Law 499, 500.

[335] James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography Special Issue: Third World Approaches to International Law' (2011) 3 Trade, Law and Development [ix], 30.

[336] Makau Mutua and Antony Anghie, 'What Is TWAIL?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31, 31.

Third World states[337] that would articulate political and economic concerns peculiar to them, with the aim of forcing those matters into the international agenda. While the success of the Conference in terms of outcome is a different subject, it at least marked the birth of multiple nations coming together with the aim of resisting an international legal order that was understood to be based on the subjugation of non-Western Third World states to the domination of the West.

There are arguments that the Third World classification has become anachronistic today because the world has moved on from the Cold War era. According to Walker, the "great dissolutions" of 1989 terminated all Cold War categories and "as a label to be affixed to a world in dramatic motion the Third World became increasingly absurd, a tattered remnant of another time".[338] However, the apparent problem with statements such as Walker's is that they ignore the obvious fact that the structures and processes of the present global capitalism are nothing short of a continuation of the past, and the political realities are not radically different from the perspectives of the so-called Third World countries. From a TWAIL perspective, the conception of the phrase "Third World" is, therefore, a group of states that are culturally, economically and politically diverse, but are at the same time united in their common history of colonial domination, which is still being sustained under the present neo-colonialism.[339] The overemphasis on the expiration of the Cold War categorisation by critics of TWAIL is unnecessary. The growing political and economic divide between the North and South is sufficient evidence, if any were needed, for the relevance of the "Third World" categorisation. Chimni also supported the view, like TWAIL and post-colonial scholars, that "once the common history of subjection to colonialism, and/or the continuing underdevelopment and marginalization of countries of Asia, Africa and Latin America is attached sufficient significance, the category 'Third World' assumes life".[340] This TWAIL understanding has also been embraced by all kinds of scholarship that is dedicated to post-colonial approaches to international law, such as NAIL. According to Shetty, "[t]he 'post' in 'postcolonial' does not refer to 'after a period of colonialism' or 'triumphing over colonialism', but to the 'continuation of

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[337] Although, the participation was limited to a few Third World states, as only four African states were not under colonial regimes as at 1955.
[338] RBJ Walker, 'Space/Time/Sovereignty' in Mark E Denham and Mark Owen Lombardi (eds), *Perspectives on Third-World Sovereignty: The Postmodern Paradox* (Palgrave Macmillan UK 1996) 15.
[339] Mutua and Anghie (n 336) 35.
[340] Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3, 5.

colonialism in the consciousness of formerly colonized peoples, and in institutions imposed in the process of colonization".[341]

3.4.2. The Central Themes of TWAIL

TWAIL is often described as a decentralised network of academics because it is not organised around vertical hierarchies of knowledge production.[342] TWAIL scholarship is an expansive, heterogeneous and polycentric dispersed network and field of study. It is a discipline with internal contestations and varied agendas among its scholars because it seeks to address the concerns of different classes within the Third World. As such, TWAIL scholars adopt different methodologies while seeking to achieve a united goal. The different approaches that can be found within TWAIL scholarship include post-modernism, feminism, Lat-Crit Theory (Latina and Latina Critical Theory), post-colonialism, literary theory, modernism, Marxism, critical race theory, and so on. Thus, similar to other ideological schools, there is no single TWAIL. However, notwithstanding all the methodological variations, TWAIL scholars are united in their common commitment to an actual universal and egalitarian international legal system that would see greater involvement of Third World peoples and other marginalised peoples in international law. Some of the central themes of TWAIL are as summarised in the next paragraph.

Through the centrality of historical, empirical and socio-legal methodologies in TWAIL scholarship, it seeks to deconstruct, unpack, and develop an understanding of the role of international law and its institutions in creating and perpetuating the subordination of the Third World to the powerful North through international legal norms.[343] It also seeks to reform and remake international law by presenting alternative normative legal mechanisms that can coexist with other critiques of the prevailing neoliberal approach to international law.[344] Also, it seeks to create opportunities for the consequential participation of the Third World in the international political and economic order through the mechanism of a reformed and an actual universal international legal order. Furthermore, through scholarship, politics and policies, TWAIL seeks to mainstream the issues of underdevelopment in the Third World and explore pragmatic ways in

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[341] Vikrant Dayanand Shetty, 'Why TWAIL Must Not Fail: Origins and Applications of Third World Approaches to International Law' (2011) 3 King's Student Law Review 68, 71.
[342] Gathii (n 335).
[343] Mutua and Anghie (n 336) 31.
[344] Chimni, 'Third World Approaches to International Law' (n 340) 22.

which the issues can be meaningfully addressed.[345] While TWAIL's core concern is the resistance of imperialism in the global order, it would, however, be simplistic to say that the Third World countries are entirely innocent victims of the dark side of the international legal order. This is because the post-colonial era was accompanied with different kinds of politics of repression within the Third World itself. TWAIL, therefore, is also critical of the Third World elites whose agendas are not totally in alliance with the aspirations of ordinary Third World peoples.

In amplifying some of the above themes, it is crucial to elucidate that history is one of the most essential elements of TWAIL scholarship due to its claim that the present international norms and institutional practices actually emerged and developed from a tainted past. Thus, before any significant reform could be made to any branch of the global order, TWAIL scholars believe that it is essential to re-evaluate the power relationship in the international legal system in order to eradicate the inherent oppression and hierarchy. TWAIL scholars have extensively demonstrated how repugnant concepts like colonial expansion and conversions of wealth were facilitated and justified by international law, under the guise of universalisation. Anghie extensively argued that colonialism was not just peripheral to international law; it was central to the formation of the system, and it still largely has enduring effect in today's relationship between states.[346] He, however, alleged that this reality has been largely obscured and misunderstood due to the fact that traditional international law scholarship has been constructed on Eurocentric narratives, which hardly take the parallel experiences of the larger Third World into account.[347]

For instance, the fundamental concept of sovereignty which theoretically guarantees the equality of states and their absolute power over their territory emerged from the Treaty of Westphalia of 1648. However, the doctrine at the time, which was inspired by the prevailing natural school, was that most non-European 'states' lacked this sovereignty. This understanding then served as legal justification for the various 'civilising missions' and economic 'explorations' of the European imperialists. Francisco de Vitoria, who is widely considered as one of the founding fathers of modern international law, extensively justified the 'right' of colonisers to travel to non-European

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[345] Mutua and Anghie (n 336) 31.
[346] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 Third World Quarterly 739.
[347] JHW Verzijl, *International Law in Historical Perspective: V. 1-*. (AW Sijthoff 1968) 435–436. *Cited in* Anghie (n 20) 740.

territories for economic purposes and to establish 'proper governance' over the natives in accordance with a 'universal natural law', as they are unfit to govern themselves – not even their family affairs. While he 'progressively'[348] considered the natives as humans bound by universal natural law, he, however, classified any form of resistance to their domination as an act of war. In describing the potential war situation, Vitoria said:

> And so when the war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans is of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and the women of the Saracens into captivity and slavery.[349]

The motive for delving into Vitoria's work is to illustrate the relationship between colonialism and international law, particularly from a book that is considered as one of the earliest, if not first, modern works of the discipline. Vitoria's work, in general, demonstrates the centrality of commerce to international law, which necessitated the development of doctrines to justify commercial exploitation and even 'just' war. It also gives a background to how international law plays a major role in presenting European subjectivity as universal objectivity, and how others are condemned as uncivilised and therefore incapable of being sovereigns. A similar structure of ideas continued in the 19th century when legal positivism became the dominant jurisprudence of international law.

While the Vitorian jurisprudence of the law of nations still affirmed that both the Europeans and non-Europeans were bound by the same higher 'universal' natural law, the strict view of the positivists that dominated the legal jurisprudence in the 19th century was that the sovereign is the exclusive creator of the law and cannot be bound by any law unless it has consented to it.[350] While this substantially guarantees a respectful relationship among European states, it expelled most non-

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[348] Vitoria's view was deemed progressive in the context of his time, because the prevailing idea characterised the Indians (natives) as "heathens, and animals, lacking any cognisable rights". *See* Francisco de Vitoria, *De Indis et De Ivre Belli Relectiones*, (Ernest Nys ed, Carnegie Institution of Washington 1917) 127.
[349] ibid 181.
[350] Anghie (n 20) 745.

European states from the realm of international law, as they were classified as uncivilised and therefore incapable of being sovereigns. This meant that those states lacked the legal personality to legally object to their dispossession and colonisation, and were therefore reduced to objects of exploitation and conquest. This was further legitimised using an old international law doctrine that supported the designation of lands occupied by 'uncivilised' non-sovereigns as *terra nullius* (meaning "nobody's land"). Among the products of the principle is the Berlin conference of 1884–85 where the European powers met to decide how Africa was to be divided among them. TWAIL scholars have argued that this categorisation of civilised/uncivilised people, based on European subjectivity, still exists in international law, even though subtly. The least of such example is the listing of general principles of law recognised by "civilised nations" as a major source of international law.[351] Many authoritative international law sources understand the phrase "civilised nations" to originally mean Christian European states as opposed to states that are not thought to possess similar values – mostly referred to with terms such as enslaved nations, rude nations, uncivilised nations or semi-civilised nations, and their inhabitants are usually referred to as barbarians or savages.[352] Although, some contemporary writers and interpreters are beginning to take a more inclusive path with regards to the understanding of the phrase.[353]

The TWAIL methodology stresses historical facts like the above, so as to show how the modern realities are connected with the past. Even after the end of formal colonialism in most parts of the world, TWAIL scholars opine that the process of decolonisation only replaced the old structure with neo-colonialism; where the Third World has continued to play a subordinate role in the international legal system.[354] This, according to many Western and non-Western scholars, has been facilitated by their economic dependence on the West which has been largely facilitated by the rules of the IEIs.[355]

It is, therefore, helpful to summarise the main characteristics of TWAIL as follows: It is anti-hierarchical, as it seeks to reform the complexes of superiority that has driven international law; it

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[351] Article 38(1)(c) of the Statute of the International Court of Justice.
[352] James Sloan, 'Civilized Nations', *Max Planck Encyclopedias of International Law* (OUP Oxford 2011).
[353] ibid 33–34.
[354] Anghie (n 20) 749.
[355] ibid. *See also* John Linarelli, Margot E Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press 2018); Stiglitz, *Globalization and Its Discontents* (n 1).

is counter-hegemonic, as it opposes the hegemony of a few powerful states, which TWAIL believes is being legitimised by the UN and other international institutions; and it is suspicious of 'universal' creeds and truths, as TWAIL is critical of the universalisation of European subjectivities such as market ideas and other values that may not fit in different contexts.[356]

3.4.3. The Relevance of TWAIL to International Economic Law

The TWAIL methodology has been adopted in critiquing virtually all aspects of international law, and IEL is not an exception. In fact, TWAIL assigns a primary significance to IEL because it views the field as the foundation upon which the edifice of international law was built.[357] As earlier discussed, historical backgrounds are usually the default starting points of most TWAIL critiques. Therefore, a TWAIL critique of IEL is usually built upon the symbiotic relationship that exists between global capitalism, imperialism, and modern international law – and this relationship, according to TWAIL, substantially accounts for why the IEO has hugely been disadvantageous to the Third World countries.[358] In analysing the background of the present global economic system, TWAIL, therefore, rejects the attempt by mainstream IEL scholars to present IEL as merely a post-Second World War phenomenon, while conveniently ignoring how imperialism has largely shaped the system. To the Third World, the present IEO is simply a successor of the earlier exploitative colonial order. One of the numerous examples that is often given to support this point is the fact that corporations that were active in the imperial project and even slave trade continue to be relevant as dominant players in today's global capitalism. For example, the Royal Niger Company (a mercantilist company chartered by the British government), which violently controlled the vast majority of distinct national territories that were subsequently amalgamated into one Nigerian state, still exists today as a major multinational company under the name Unilever. The company was instrumental in the formation of Colonial Nigeria, as it enabled the British Empire to establish control over the lower Niger against the German competition led by Bismarck during the 1890s.[359] Another famous example of such corporation is De Beers Group, which specialises in diamond

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[356] Mutua and Anghie (n 336) 36–38.
[357] BS Chimni, 'Critical Theory and International Economic Law: A Third World Approach to International Law (TWAIL) Perspective', *Chapters* (Edward Elgar Publishing 2013) 254.
[358] BS Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14 Oregon Review of International Law 17.
[359] 'Royal Niger Company | British Company' (*Encyclopedia Britannica*) <https://www.britannica.com/topic/Royal-Niger-Company> accessed 30 April 2021.

exploration among other diamond mining activities, and still operates today in about 35 countries. The company was established by Cecil Rhodes, a fierce colonial figure who vigorously advocated for settler colonialism under the supremacist belief that "the more of the world we [referring to the Anglo-Saxon race] inhabit the better it is for the human race".[360] The company has often been criticised for its role and that of its founder in the advancement of British imperialism, the exploitation of natural resources in countries under colonial control, and disregard for the rights of the natives, especially in southern Africa.[361] The reality is that companies with histories and legacies like the above mentioned still operate as major players in the modern IEO, and it is alleged that their neo-colonial interests are still being fulfilled through the IEIs.

Realities such as the above have, therefore, generated a series of Third World critiques and political resistance to the IEO. An example of such is the new international economic order (NIEO) critique. The NIEO is a set of ambitious proposals by some developing countries, known as the Group of 77 in 1974, to restructure the IEO by establishing a balance in the relationship between the Western industrial economies and the predominantly raw material producing economies of the Third World. The NIEO also challenged the unfair rules imposed by international trading, investment and finance regimes, and advocated in favour of the right to development. Notwithstanding the majority status of the countries in support of the NIEO and its adoption as a declaration of the United Nations,[362] the hierarchical power structure of the UN and the lack of political will from the industrial nations often render such initiatives unsuccessful. TWAIL scholars have also alleged that such Third World concerns have received very little attention from the mainstream IEL scholarship, and have in numerous cases been dismissed.[363] In view of all the above, some of the main issues that are relevant to the critical Third World approach to IEL will be briefly mentioned below.

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[360] Cecil Rhodes, *The Last Will and Testament of Cecil John Rhodes : With Elucidatory Notes to Which Are Added Some Chapters Describing the Political and Religious Ideas of the Testator*, (William Thomas Stead ed, London: 'Review of Reviews' Office 1902) 58 <http://archive.org/details/lastwilltestamen00rhodiala> accessed 30 April 2021.
[361] 'Cecil Rhodes | Biography, Significance, & Facts' (*Encyclopedia Britannica*) <https://www.britannica.com/biography/Cecil-Rhodes> accessed 30 April 2021.
[362] UN General Assembly Resolution, *Declaration on the Establishment of a New International Economic Order*, A/RES/S-6/3201, (May 1974).
[363] Chimni, 'Critical Theory and International Economic Law' (n 11) 256–257.

Firstly, one of the most consistent issues that arises in TWAIL critiques is the need to revisit the ideologies that have dominated the IEL thinking, such as the free trade and other liberalisation policies. Most of these policies have been imposed on most developing countries as preconditions to join the international organisations, receive different kinds of foreign assistance, and for other political and economic reasons. However, experts have consistently asserted that, while the policies might be beneficial in some ways, they mostly serve the interest of the big corporations, as opposed to the Third World peoples that are the main concern of TWAIL.[364] While TWAIL is not opposed to the implementation of liberalisation policies, it seeks for an IEO that will genuinely consider the harmful implications of these policies on ordinary people and workers of developing countries.[365] Leading economists like Stiglitz have argued that the development level of countries must be taken into consideration when pushing for trade liberalisation. According to him, the real issue is not whether to liberalise or not, but the appropriate time and to what extent.[366] History also has it that most of the developed countries actually industrialised behind high tariff walls and a range of protectionist measures, which technically have not been absolutely eliminated even today.[367]

Secondly, TWAIL scholars allege that IEL does not give sufficient attention to the operationalisation of social and economic rights, and this explains why these rights have not been developed to have practical content. Scholars have contended that where social and economic rights, such as the right to health, compete with other interests such as the international patent regime, that mostly stand to benefit the developed countries and their corporations, the actors promoting such property rights usually possess greater power and resources, which thereby affects any chance to find a meaningful balance between the contending rights. This problem is also compounded by the fact that development is not satisfactorily recognised as freedom. Notwithstanding the fact that 146 states voted in favour of the UNDRD, the opposition it has faced from the states dominating the global economic and political arena has rendered the right practically ineffectual. TWAIL, therefore, emphasises the need to identify and work on the main

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[364] Stiglitz, *Globalization and Its Discontents* (n 1).
[365] Chimni, 'Critical Theory and International Economic Law' (n 11) 264.
[366] Joseph E Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford University Press USA - OSO 2006).
[367] Chimni, 'Critical Theory and International Economic Law' (n 11) 264.

obstacles affecting the realisation of the goal of development as freedom. For instance, Chimni contends that proper recognition and operationalisation of the RTD, which places significance on human development, is capable of restoring the crucial policy spaces for developing countries to implement necessary developmental programmes.[368]

A third important issue at the heart of TWAIL's critique is the continuous use of different types of coercion by powerful nations to get Third World nations to accept economic policies that could be unfavourable to them. These could include the blocking of loans from international financial institutions, unilateral economic sanctions, threat to deny development aid, and even direct push for regime change or support of dictatorial elites in the Third World.[369] All these concerns are matters that should be within the concern of IEL because the goals of such forces are usually to realise commercial and economic gains. However, the mainstream IEL scholarship has been accused of ignoring such significant matters, as they choose not to be concerned with the processes through which economic phenomena are made the subject of international regulation. Some other major concerns that have occupied the critical TWAIL approach to IEL include the need to increase the transparency and accountability of the IEIs and transnational corporations; the need to make the interests of people and development policies the central subject of IEL as opposed to just the states; the need to make effective use of the language of human rights in international agreements to further the interests of the poor and marginalised groups; the need to ensure an equitable global sustainable development policy; the need to map out a global economic theory of justice that rejects "methodological nationalism" and so on.

In summary, the critical TWAIL approach to IEL essentially rejects the prevailing formalist approach that only seeks to explain the rules of international economic phenomena and chooses to exclude the underlying issues that are fundamental to its structure. Thus, the central ambition for TWAIL is how it will unshackle international law and its various branches from its foundational inequities, with the aim of providing a global egalitarian system for the universal benefit of the global populace, particularly the marginalised Third World.[370]

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[368] *See* B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 European Journal of International Law 1. The author extensively explained how the internal policy standards imposed by international economic institutions hamper the development of developing countries.
[369] Chimni, 'Critical Theory and International Economic Law' (n 11) 258.
[370] Mutua and Anghie (n 336).

3.5. Conclusion on Theories – Five Conceptual Principles for the Realisation of Global Economic Justice

Discussions on global economic justice have customarily been approached through singular theories or viewpoints, with proponents of various approaches mostly engaging in asserting the superiority of their views above others. While this could sometimes be a necessary practice, especially when contending against fundamentally opposing ideologies, it will also be of great benefit if researchers/theorists on the subject of global justice could adopt a pluralistic approach, wherein multiple methods, notwithstanding their possible dissimilarities on some matters, can be brought together in discussing the subject. This methodological "pluralism" was rightly advocated by Sen, who argued that insisting on just a single approach to justice, while disregarding other competing principles in total, "may be a mistake".[371] While there are apparent differences between competing approaches to justice, such differences are however not always sufficient for us to conclude that they individually cannot survive critical scrutiny and have legitimate claims to fairness. Moreover, alternative approaches may help remedy situations where one approach is insufficient in scope or wanting in how it addresses certain justice questions. According to Sen, "reasonable arguments in competing directions can emanate from people with diverse experiences and traditions, but they can also come from within a given society, or for that matter, even from the very same person".[372] Following Sen, a similar approach was also adopted in relation to IEL by Garcia in his *Global Justice and International Economic Law: Three Takes*, wherein he explored three different competing political theories of justice, albeit all within the liberal normative tradition, in addressing the question of fairness in IEL.[373] For all the above reasons, this thesis also combines three complementary approaches (Distributive Justice, RTD, and TWAIL) in addressing the question of justice in the global economic arena. Adopting Garcia's expression, this is essentially a matter of "seeking the best arguments with the broadest base towards a common goal".[374]

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[371] Sen (n 21) 10.
[372] ibid x.
[373] *See* Frank J Garcia, *Global Justice and International Economic Law: Three Takes* (Cambridge University Press 2013). *The author adopted Rawlsian liberalism, communitarianism, and consent theory in discussing global justice in IEL.*
[374] ibid 17.

Overall, the aim of this chapter, as mentioned in section 3.1, is to examine the three theoretical and normative approaches and thereafter extract relevant principles to serve as the key pillars on which to base the realisation of fairness in the IEO. The three approaches have been extensively discussed under sections 3.2, 3.3 and 3.4. This last section of the chapter will, therefore, consider distilled principles that, in the opinion of this thesis, should underlie the realisation of global economic justice, building upon the common elements of the three theories. Without doubt, there are abundant concepts that could be extracted from the three theories; but for the purpose of this thesis, five conceptual principles have been carefully chosen due to their particular relevance to international economic and trade relations. These five principles will serve as the basis to analyse, critique and offer proposals to the trade matters that will be discussed in the case study section in chapter four. It is worth mentioning that TWAIL will not be directly referred to as consistently as the two other theories when analysing the extracted principles, because the critical approach does not restrict itself to any particular means to achieving global economic justice, provided that the end result is in harmony with its objectives and favourable to the wellbeing of the Third World people and the global populace in general. Moreover, the RTD, which will be referenced under the different principles, is arguably a major product of the Third World critical approach. The five distilled principles are, therefore, as follows:

1. Development as the central objective of international trade policies
2. Operationalisation of differential treatment in trade policies
3. Mainstreaming human rights in international trade policies and agreements
4. Equality of participation and transparency in international trade practice
5. Expansion of global social responsibility

All the above interrelated principles have been mentioned under various sections in this thesis either specifically or indirectly, and they are substantially dependent on each other in realising considerable equity in the global economic order. The principles have been selected based on their direct pertinence to fairness in the IEO, and in particular, their prospect of forming the basis of possible solutions to the practical issues in the case study sections. While this thesis identifies and analyses the extracted principles as offshoots of the three theoretical approaches, they have also independently gained momentum in discussions surrounding fairness in general and specifically

in relation to international economic policy. For instance, principles such as equity, participation, transparency and accountability have been mentioned (even though from diverse logical premises and perspectives) in different scholarly works, human rights instruments and even international resolutions as necessities for achieving global economic justice. However, a main novelty of this chapter is the fact that these principles will be discussed from the viewpoints of the three theoretical approaches. Further explanation on the significance and relevance of the five principles to the international trade regime will, therefore, be provided in the subsequent sections.

3.5.1. Development as the Central Objective of International Trade Policies

The inevitable connection between trade and development has been stressed in section 3.2.6. It is, however, worth emphasising that there is the critical need for the reconsideration of how we think about trade policies, especially with respect to concepts that are prioritised as the central objectives of international trade. The unrestricted devotion to concepts such as free trade and other similar liberalisation models need to be re-evaluated in light of their actual effect on the sustainable development of the global populace. This thesis, therefore, submits that such concepts should be treated as a means to achieve the development of people's wellbeing, rather than being the central ends of trade policies. Instead, development should be taken as the primary objective of trade policies.

Adopting the definition of the UNDRD, development here will be generally understood as "a comprehensive economic, social, cultural and political process, *which aims at the constant improvement of the well-being of the entire population and of all individuals*".[375] This thesis views this definition of development as preferable because it focuses on the interests of all individuals, as opposed to the common state-based method of analysing and evaluating development, which mostly obscures the actual distribution of economic benefits within a given setting. Therefore, this thesis submits that international policymakers should be more committed to how the trade policies they enact affect the wellbeing of human beings, in terms of their food security, good health, quality of life, positive physical and mental health, prosperity, safety, and so on.

[375] UNDRD, Preamble. (emphasis added).

The idea of making development concerns central to the international trading policy is found in all three theoretical approaches earlier discussed in this thesis. Even though it appears to be more conspicuous under the RTD, development is nonetheless one of the main end goals of the discussed distributive justice principles, and predictably, the TWAIL methodology. However, it is worth mentioning that the means through which the various approaches seek to achieve a development-centred international trading system differ, and this has generated debates among scholars. This dispute is mainly between those that advocate the implementation of developmental policies through human rights approaches such as the RTD, and the scholars that approach global economic justice through political/legal theories such as Garcia and Linarelli. For instance, while Garcia rightly emphasised, on the one hand, that "developing countries must re-focus WTO trade and development policy around the twin goals of development and fairness",[376] he, however, declares elsewhere that he disagrees with "other approaches that ground developing country trade concerns in the discourse of human rights, such as the right to development".[377] Like Garcia, Linarelli also termed the human rights approaches to global economic inequities as "nebulous" and "imprecise", and that they sometimes conflict with the actual interest of fairness.[378] He cited the example of how intellectual property rights were used to justify aspects of the TRIPS Agreement that conflicted with the human right to health.[379] In essence, scholars like Garcia opine that the proper method of implementing fair and development-centred international trade policies is by acknowledging the existence of a moral obligation[380] upon the wealthy states to ensure that the problems of inequality are well addressed, by virtue of their commitment to liberal tenets, through the introduction of favourable mechanisms.[381]

While Garcia's position provides a sound philosophical basis, the possibility of the practical materialisation of such a subjective ethical concept is very much in doubt, especially in an economic environment where value judgements are contemptuously regarded. Thus,

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[376] Frank J Garcia, 'Beyond Special and Differential Treatment' (2004) 27 Boston College International and Comparative Law Review 291.
[377] Frank J Garcia, 'Trade and Inequality: Economic Justice and the Developing World' (1999) 21 Michigan Journal of International Law 975, 980.
[378] John Linarelli, 'What Do We Owe Each Other in the Global Economic Order: Constructivist and Contractualist Accounts' (2005) 15 Journal of Transnational Law & Policy 181, 204.
[379] ibid.
[380] Garcia conceives the commitment to liberal tenets by most developed countries as the source of a moral obligation.
[381] Garcia, 'Trade and Inequality' (n 8) 981.

notwithstanding some of the legitimate criticisms against the human rights approach, this thesis will take a middle path by submitting that the human rights framework, despite its numerous limitations and imperfections, still offers a practicable constitutional basis for the implementation and enforcement of fair and development-centred policies. In fact, human rights principles such as the RTD do not exist in a vacuum; they mostly rest their principles on philosophical premises. For example, the UNDRD enshrined the principles of fair distribution and equality of opportunity, which Garcia also commits to, as elements of the RTD. This thesis, therefore, submits that the struggle for a just IEO cannot be exhausted in a single approach to justice. Both the human rights approach and political theories can complement one another with a view to improving the ideas and their implementation.

In conclusion, the main contention of this section is that development concerns should be considered as the primary and inviolable objective of international trade relations, above other peripheral considerations. Some could argue that a number of international trade agreements usually stipulate development as part of their goals. However, a reasonable and objective analyses, as pointed out in various sections of this thesis, can reveal how most of such declarations hardly materialise in the real world. It is also important to note that it is one thing to claim development as a goal among other objectives; it is another thing to make it the central objective that cannot be subordinated to any other consideration. The latter represents the submission of this thesis.

3.5.2. Operationalisation of Differential Treatment in Trade Policies

Considering the unequal position of the participants in the global economic order and its asymmetric effect,[382] the international trading system needs to be more committed to strengthening equitable values that would grant exceptional treatment to those in a less-favourable position, in order to aid development as an objective and for the system to be less unfair. This idea is justified by Rawls' difference principle as an essential condition for distributive justice, and scholars have argued in favour of its global applicability, especially with respect to international trade.[383] From a human rights perspective, differential treatment is also considered as one of the underlying principles of the RTD.[384] Several provisions of the UNDRD emphasise the special status of

[382] For explanation on the asymmetric effect of the IEO, see section 2.3.
[383] See 3.3.5 and 3.3.6 for the global applicability of the difference principle.
[384] Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions*

countries with lesser development standards, despite the fact that all states are subjects of the right and duty-holders under it. For instance, the UNDRD notes that "sustained action is required to promote more rapid development of developing countries", and that "effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development".[385] Such special treatment has also been considered by some authors to have emerged over decades of states practice, and that it is grounded in the duty to cooperate for development.[386] The idea of differential treatment is also considerably similar to some existing human rights arguments such as affirmative action, equality of opportunity, and substantive equlity, which are all premised on the notion of equality of outcome and not just equality of opportunity.[387]

The concept of differential treatment already exists, to a relative extent, in the WTO framework as the principle of SDT. It is described as the product of "the coordinated political efforts of developing countries to correct the perceived inequalities of the post-war international trading system by introducing preferential treatment in their favour across the spectrum of international economic relations".[388] Through different measures, SDT aims to take account of particular risks and vulnerabilities that developing countries face in international trade, especially in areas such as market access, market protection, and technical assistance. However, the effectiveness and enforceability of many of the SDT provisions in practice have been called into question. In fact, they are seldom interpreted favourably in the WTO dispute settlement proceedings.[389] For the above reason, the Ministers at the 4th WTO Ministerial Conference in Doha mandated the Committee on Trade and Development to examine the SDT provisions in the WTO Agreements, with the stated view of improving the binding nature of the STD provisions. The Doha Ministerial declaration reads:

(Bloomsbury Publishing PLC 2012) 217.
[385] UNDRD, Article 4.
[386] Roland Rich, 'The Right to Development: A Right of Peoples' (1985) 9 Bulletin of the Australian Society of Legal Philosophy 120.
[387] Natalie Baird, 'Disasters, Human Rights and Vulnerability: Reflections from the Experiences of Older Persons in Post-Quake Canterbury' (2021) 2 Yearbook of International Disaster Law Online 314.
[388] Murray Gibbs, 'Special and Differential Treatment in the Context of Globalization', *Note presented on behalf of UNCTAD to the G15 Symposium on Special and Differential Treatment in the WTO Agreements, New Delhi* (1998).
[389] See examples in section 2.2.4.

> We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries… We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.[390]

After the Doha declaration failed to materialise into any significant benefit, a "monitoring mechanism" was established at the Bali Ministerial Conference in 2013 to review and analyse the implementation of the SDT provisions, with the possibility of making recommendations to relevant WTO bodies. However, these commitments are yet to yield any substantial progress in addressing the concerns regarding the effectiveness of the SDT provisions. Unfortunately, a more encompassing and effective SDT implementation is a germane element for the realisation of distributive justice and development as a goal of the multilateral trading system. As Garcia succinctly said, "Developing countries need a comprehensive agreement on S&D [SDT] clarifying that development, not trade liberalization, is the number one economic policy goal of developing countries, and that fairness, not charity, is the basis for development".[391] Alas, the attitude of the WTO policymakers and the dispute settlement body towards SDT seems to have placed liberalisation policies above development. This thesis takes the opposite approach.

The problems with the operationalisation of the SDT are numerous; some of which have been discussed under different sections of this thesis, particularly in sections 2.2.4 and 3.3.6. One main problem is the fact that some of the SDT provisions, as earlier discussed, are required to be implemented through discretionary and nonbinding programmes. Apart from the fact that such provisions are usually not enforceable as of right, they also serve as an opportunity to the countries that choose to offer such preferences to impose a host of non-trade related conditions on the receiving countries, which is effectively a means of control.[392] Another flaw of SDT provisions is that they are limited in scope. While it could be said that the majority of the developed economies and some major developing countries have granted duty-free quota-free (DFQF) market access to

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[390] Paragraph 44, 'Doha WTO Ministerial Declaration' (2001) <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> accessed 30 April 2021.
[391] Garcia, 'Beyond Special and Differential Treatment' (n 376).
[392] ibid 303.

LDCs in principle, sectors that are supposed to be of utmost importance, such as agriculture and textiles, are sometimes exempted from this preferential treatment.[393] This, therefore, renders the DFQF meaningless because sectors where most of the LDCs have competitive advantage are not usually covered.[394]

In summary, the primary purpose of this section is not to delve so much into the debates concerning the SDT provisions of the WTO Agreements. It is more interested in establishing that the idea of differential treatment is an essential element for achieving both distributive fairness and development in the international trading system – and for this to be meaningfully accomplished under the WTO, a reformed SDT is required in terms of scope, effectiveness, and implementation.

3.5.3. Mainstreaming Human Rights in International Trade Policies and Agreements

The theoretical underpinnings of the international trade regime and human rights law, as they currently stand, fundamentally differ.[395] While the former is primarily committed to the ideals of unhindered movements of goods, services and capital, the latter is more concerned with the dignity, wellbeing and welfare of individual human beings, and, sometimes, peoples. This difference in ideals can easily be observed from the usage of similar terminologies in the different realms. For example, when words such as freedom, equality, rights and non-discrimination are used in the human rights context, they are usually used in connection with the protection of vulnerable humans of the society. However, when adopted in a trade law context, they are primarily used to confront any hindrance that may prevent investors or corporations from doing business, notwithstanding the effects of such business practices on human beings. Thus, even though we can find various WTO documents stressing the organisation's commitments to human rights, the differences in the fundamental values that both realms advocate usually create situations where they clash.

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[393] Nicolas Imboden, 'Special and Differential Treatment: A New Approach May Be Required | International Centre for Trade and Sustainable Development' (2017) <http://www.ictsd.org/bridges-news/bridges-africa/news/special-and-differential-treatment-a-new-approach-may-be-required> accessed 30 April 2021. See also, for example, the USA's "*Trade Preferences Extension Act of 2000 (Ammended in 2015)"* which stated aim is to enhance market access for Sub-Saharan African countries, but nonetheless excludes numerous types of textiles and footwares from the preferential treatment policy.

[394] ibid. *See also* Garcia, 'Beyond Special and Differential Treatment' (n 6) 303.

[395] Dan Seymour and Jonathan Pincus, 'Human Rights and Economics: The Conceptual Basis for Their Complementarity' (2008) 26 Development Policy Review 387.

The theoretical conflict between the international trade regime and human rights has materialised in practice in different instances, and this has consistently created conflicts between human rights activists/NGOs and trade policymakers. This is even more pronounced in relation to social, economic and cultural rights than civil and political liberties. Examples of recognised human rights principles that have been or are still being infringed in different ways by international trade policies include the right to an adequate standard of health through the TRIPS Agreement which limited the ability of developing countries to provide free and/or cheaper generic versions of patented drugs.[396] Other examples of breaches are of the right to food through unfair competition which forces small-scale farmers to abandon their lands to sectors other than food production who will then be unable to feed themselves, and issues concerning transnational corporations (TNC) and international labour standards.[397]

Interestingly, when issues are raised in relation to the effects of international trade in mainstream IEL, the arguments are usually centred on utilitarian calculations such as the Gross Domestic Product (GDP), efficiency, Gross National Product (GNP), or other material indicators that are mainly concerned with aggregate welfare. This approach differs from the ethical/moral criteria of human rights, which set minimum standards for the protection and wellbeing of every human being.[398] Therefore, in a world where human rights are now widely acknowledged as a major standard of civilisation, this thesis, therefore, submits that any contention between the two regimes should always be settled in favour of human rights above purely economic considerations.

This position is also justifiable from the perspective of all three theoretical approaches discussed in this thesis. As mentioned in section 3.3.4, Rawls's first principle of distributive justice affirms the essentiality of basic rights and liberties, and he even confers on it a lexical priority over the

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[396] Attempts have been made to remedy the issue of access to medicines through the inclusion of Article 31*bis* of the TRIPS Agreement (as well as the Annex and Appendix) in 2017. However, the system is still not without its shortcomings, especially with practical difficulties. *See in general* Ellen't Hoen, 'Access to Medicines Amendment of the WTO TRIPS Agreement. Hype or Hope?', Medicines Law & Policy <https://medicineslawandpolicy.org/2017/04/access-to-medicines-amendment-of-the-wto-trips-agreement-hype-or-hope/> accessed 30 April 2021; *See also* Carlos Correa, 'Will the Amendment to the TRIPS Agreement Enhance Access to Medicines?' Southern Centre Policy Brief <https://www.southcentre.int/wp-content/uploads/2019/01/PB57_Will-the-Amendment-to-the-TRIPS-Agreement-Enhance-Access-to-Medicines_EN-1.pdf> accessed 30 April 2021.

[397] *See generally,* Abadir M Ibrahim, 'International Trade and Human Rights: An Unfinished Debate Developments' (2013) 14 German Law Journal 321.

[398] *See generally* Gerhard Ernst and Jan-Christoph Heilinger, *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter, Inc 2011).

second principle of his *Justice as Fairness*.[399] The applicability of Rawls's theory has been further developed into a global principle applicable to IEIs, as already discussed in section 3.3.5. Also, the UNDRD makes references to human rights under multiple articles, and the principle of respect for human rights is fundamental to the understanding and realisation of the RTD, which by itself is a human right. Particularly, Article 3.3 declares that "states should realise their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all states, *as well as to encourage the observance and realisation of human rights*".[400] The Declaration also reiterates that resolute steps should be taken to "eliminate massive and flagrant violations of the human rights of peoples and the human beings affected" that may occur from all forms of situations.[401] Among other similar provisions, Article 6.3 also affirms that steps should be taken to eliminate various impediments to development that may result from the failure to observe and recognise the civil and political rights, as well as economic social and cultural rights of the human person, which is the primary subject of the RTD.[402]

In conclusion, all the above arguments are for the purpose of making a claim in favour of the primacy of respect for human rights as "inalienable" and a requirement for realising fairness and development as the main goal of international trade. The rights of humans individually and collectively should be the fundamental measure to evaluate trade policies and not the other way around. While it could be argued that the WTO has at various points considered human rights or even reformed some of its policies to conform to human rights principles, the crux of this section is that human rights should not be an afterthought or a secondary consideration that mostly becomes an issue only after so many agitations. It should rather operate as part of the first principles that trade policies and adjudication must always genuinely take into consideration.

3.5.4. Equality of Participation and Transparency in International Trade Practice

The processes of decision-making, negotiation and discussion in the WTO are usually characterised as not truly democratic, transparent, open and participatory. Yet, the WTO frequently

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[399] See explanation in section 3.3.4.
[400] UNDRD, Article 3.3 (emphasis added).
[401] ibid, Article 5.
[402] ibid, Article 6.3.

describes itself as "a member-driven, consensus-based organisation" because "all major decisions are made by the membership as a whole".[403] While, in principle, the WTO's decision-making process is either by the general consensus of all Members or through voting with each country having one vote in rare cases,[404] the democratic legitimacy and transparency of the organisation has often been challenged due to the disproportionate power that the most powerful nations can wield in dictating the result of WTO negotiations.

The most usual example given by authors and activists is the adoption of a controversial process of negotiation popularly described as the "Green Room phenomenon". This is used to describe an informal meeting, convened by the Director-General, whereby key trade negotiations leading to WTO agreements will occur in the "Green Room"[405] by small groups or caucuses, usually heavily influenced by the United States, the EU, and some other developed nations.[406] The resolutions reached in the Green Room are thereafter presented to all Members for their consent. The Green Room phenomenon has been criticised by academics and NGOs as undemocratic because it is strictly by invitation and the vast majority of the WTO Members, especially the least-developed countries, are not usually extended the privilege to attend such critical meetings.[407] NGOs like the Third World Network (TWN) have on this basis described the WTO as "probably the most non-transparent of international organisations".[408] That said, one could argue that the practice is not entirely undemocratic because resolutions from Green Room meetings must be consented to by all parties before it can become binding. However, the reality, as alleged, is that pressures may be exerted on the smaller countries, through bilateral aid or IMF or World Bank loans, to get them to go along with the Green Room position.[409] Moreover, the records or details of the deliberations

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[403] 'WTO | Understanding the WTO - Whose WTO Is It Anyway?' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm> accessed 30 April 2021.
[404] Agreement Establishing the World Trade Organisation, Article IX.
[405] The Green Room is an informal name for the Director General's conference room. *See* 'WTO | Glossary - Green Room' <https://www.wto.org/english/thewto_e/glossary_e/green_room_e.htm> accessed 30 April 2021.
[406] Richard H Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO' (2002) 56 International Organization 339.
[407] Abadir M Ibrahim, 'International Trade and Human Rights: An Unfinished Debate Developments' (2013) 14 German Law Journal 321, 330.
[408] 'Transparency, Participation and Legitimacy of the WTO', Statement of the Third World Network at the WTO Symposia on Trade and Environment and Trade and Development <https://twn.my/title/legit-cn.htm> accessed 30 April 2021.
[409] ibid.

that occur in such caucuses are not usually available for public scrutiny, which presents a fundamental problem to the organisation's transparency and democratic legitimacy.

Another example of a situation where Members of the WTO are unable to participate equally has been explained in section 2.4.1 of this thesis, regarding the issue of the impracticality of smaller states, especially the LDCs, to enforce WTO rulings, because the enforcement procedures are designed in a way that requires the ability of Members to exert economic and political power. This has been advanced as a reason why no LDC has ever relied on the WTO dispute settlement mechanism as a complainant, barring the most recent Plain Packaging cases.[410]

The principles of equal participation and transparency are significant as they are necessary ingredients for the realisation of justice, fairness, and development. It is only through guaranteed equal and meaningful participation of Members that policies can adequately represent the interests of all and not just the influential few. This position is affirmed under different provisions of the UNDRD.[411] In the 1995 World Summit for Social Development, held in Copenhagen, it was declared that "full participation by all" is fundamental to policies and actions that aim to promote the betterment of human condition, social progress, and justice.[412] These two elements are also recognised as vital components for development and integral to the realisation of RTD in the United Nations' Agenda for Development. It provides:

> Democracy, respect for all human rights and fundamental freedoms, including the right to development, transparent and accountable governance and administration in all sectors of society, and effective participation by civil society are also an essential part of the necessary foundations for the realization of social and people centred sustainable development. [413]

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[410] Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, (DS435, 441, 458, 467).
[411] *See* UNDRD, Articles 1, 2.1, 2.3, and 8.
[412] The World Summit for Social Development, Copenhagen, 6-12 March 1995, A/CONF.166/9; Copenhagen Declaration on Social Development, Part B: Principles and Goals, para 25.
[413] The UN Agenda for Development was adopted by the General Assembly on 20 June 1997. *See* A/AC.250/1 (parts I, II and III), 16 June 1997.

Drawing from the discussed theoretical approaches and the fact that the concepts of transparency and inclusive participation are major elements of human rights based and TWAIL approaches,[414] this thesis, therefore, submits that policies should be considered for the improvement of Members' participation and transparency in the negotiating, adjudicating and decision-making processes of the international trading system for adequate realisation of fairness in practice.

3.5.5. Expansion of Global Social Responsibility

Global social responsibility is an ethical obligation on entities, be they states, corporations, organisations or individuals, to act in the best interest of their environment and the global society at large. Traditionally, most of the deliberations surrounding the realisation of an international trading system that will ensure fairness, human rights and development objectives have been focused on the responsibility of states and, to a lesser extent, international organisations as the major actors. However, considering the activities and mounting influence of other actors in the international trade arena, it may be of great benefit to the aforementioned agendas if the focus of social responsibility is expanded to include other actors such as transnational corporations (TNCs) and non-governmental organisations (NGO). This in the wider context can aid the advancement of human rights, environment protection, and other developmental goals.

For example, the role of NGOs is becoming more prominent to the extent that they are recognised as vital players at the national, regional, and international levels. In a UN report, they were described as "catalytic elements in the realization of the right to development".[415] NGOs can, therefore, play the important role of serving as checks and balances for policies of the IEIs and the activities of Members. Thus, a proper integration of the NGOs of various interests in trade negotiations can help policymakers to be aware of vital considerations. Alas, while the WTO, upon its creation, offered the possibility of more engagement with NGOs than the previous GATT regime, NGOs still do not have any real place in the 'inner temple' of the WTO's decision making, unlike some other international organisations.[416]

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[414] For a TWAIL analyses on the need to increase transparency and accountability in the IEIs, See Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3, 8 & 22.
[415] UN Doc. E/CN.4/1994/21 (1994), para 38 (c).
[416] Jens Steffek, 'Awkward Partners: NGOs and Social Movements at the WTO' [2012] The Oxford Handbook on The World Trade Organization.

There is the need for the increased recognition of the role of NGOs or "civil societies" in both domestic and international policymaking, particularly in realising global economic fairness through development-centred policies and human rights. In relation to the realisation of the RTD, for instance, a General Assembly resolution makes a number of references to NGOs, such as:

> [The recognition] that the implementation of the Declaration on the Right to Development requires effective development policies and support at the international level through the effective contribution of … non-governmental organizations active in this field.
>
> To ensure widespread dissemination and promotion of the [RTD] in close cooperation with States and intergovernmental organizations, national institutions, academia and interested non-governmental organizations worldwide.[417]

Beyond the responsibility of checks and balances that are required from NGOs as non-state actors in the international trading system, there are growing calls for effective regulation of the activities of TNCs in order to ensure that they are also socially responsible in the way they carry out their businesses and their associated impact on society. This can be achieved through a greater enforcement of "corporate social responsibility". While positivist economists like Friedman oppose the idea of corporations having social conscience as an irrational concept,[418] there is also the growing awareness in more recent times that businesses "are co-existent with society and can therefore not simply ignore the expectations society might have of them".[419] This is important in the international context, because as trade liberalisation increases, TNCs which are perhaps the greatest beneficiaries also have to evolve in terms of their responsibility to realise development goals. It is even of greater importance if one considers the numerous allegations that link the exploitative global economic order to various activities of international companies.[420]

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[417] UN Doc. A/RES/53/155 (1999).
[418] Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' in Walther Ch Zimmerli, Markus Holzinger and Klaus Richter (eds), *Corporate Ethics and Corporate Governance* (Springer 2007).
[419] E Joyner Brenda and Paynee Dinah, 'Evolution and Implementation: A Study of Values' (2002) 41 Business Ethics and Corporate Social Responsibility 298.
[420] A leading example of this view can be found in, David C Korten, *When Corporations Rule the World* (3rd edition, Berrett-Koehler Publishers 2015).

A major effort aimed at ameliorating the excesses of TNCs can be found in the UN's framework for business and human rights, which is also gaining attention in the academia. The framework is grounded on three foundational principles that are generally referred to as the Protect, Respect and Remedy framework (PRR).[421] They represent the obligation of states to protect against human rights abuses by corporations through appropriate laws and policies; the responsibility of corporations to respect human rights principles by acting diligently to avoid infringing on people's rights; and the facilitation of effective grievance mechanisms by states to ensure that those affected by human rights abuses have access to effective remedies.[422] It is, however, important to keep in mind that PRR is not a governance or regulatory framework in itself, but a mere platform of guidelines or recommendations by which interested parties may define mechanisms using either obligatory regulatory mechanisms or indeed voluntary initiatives.[423] Although, there are ongoing efforts by the UN Human Rights Council to provide an internationally binding instrument to regulate the activities of transnational corporations.[424]

While this thesis acknowledges that there have been various international efforts, through international organisations like the UN, academics specialising in the emerging field of business and human rights, the media and other non-state actors, to ensure corporate organisations (especially TNCs) do not continue to operate in a way that hampers the development of people, it nonetheless reinforces the view that a more developed and coordinated effort is required for the adequate implementation and enforcement of policies that can ensure that corporations are socially responsible.

3.6. Conclusion

In conclusion to chapter three in general, the discussed five principles represent the conceptual contribution of this thesis to the normative challenges facing the international economic and trading system. This thesis argues that the proper assimilation of these principles into various

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[421] Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 2 March 2011, UN Doc. A/HRC/17/31.
[422] ibid.
[423] Michael K Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 Human Rights Law Review 133.
[424] *See* 'Binding Treaty' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/big-issues/binding-treaty/> accessed 30 April 2021.

aspects of the international trading agreements and policies could lead to an equitable, fair, and development compliant trading system that could be more beneficial to the world. While some of the conceptual principles could have been expressed differently in some other contexts and based on different premises, their discussion in this thesis could be distinguished based on the fact that they are perceived and analysed through the combined lenses of the RTD, distributive justice and TWAIL. Therefore, while this chapter provides theoretical/normative proposals that could ameliorate the inherent unfairness in the international economic order, as established in chapter two, the following chapter serve as the practical case study in which the five conceptual principles are adopted to analyse, critique and proffer practical solutions to an international trade agreement (i.e. the Agreement on Subsidies and Countervailing Measures). In essence, chapter four demonstrates the operationalisation of the five conceptual principle to a practical case study.

CHAPTER FOUR

4.0. LEGAL AND NORMATIVE CRITIQUE OF THE INTERNATIONAL TRADE SUBSIDIES REGIME

4.1. Introduction

The objective of this chapter is to make evident the practical relevance of the five conceptual principles for the realisation of global economic justice discussed in chapter three, by employing them to analyse and critique a practical case study in the international trade law. This chapter specifically adopts the conceptual principles to normatively critique pertinent issues relating to the international trade subsidies regime, and particularly the prohibited subsidies under the Agreement on Subsidies and Countervailing Measures. The main justification for this critique stems from the abundant complaints against the subsidies regime for its violation of essential normative values such as development, equity, fairness, transparency and human rights.[425]

Subsidies in the context of international trade is a double-edged sword. On the one hand, classic economic and development theories postulate that its usage can be an instrument to offset market failures in order to achieve greater economic efficiency as well as support the advancement of welfare and other development concerns.[426] On the other hand, its usage can also lead to distortions in the global market, which has the capacity to generate negative effects that hamper fundamental development and human rights objectives, such as food security, the right to an adequate standard of living, and even environmental concerns.[427] For instance, the heavily subsidised agricultural industries in some developed jurisdictions like the United States and the European Union have enormous distortive effects on global trade competition – this was a major contributory factor for

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[425] *See for examples,* Yong-Shik Lee, 'Economic Development and the World Trade Organisation: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in WTO' (2009) 325 Developing countries in WTO Legal System (Oxford University Press, Oxford 2009); Ha-Joon Chang, 'Kicking Away the Ladder–Globalisation and Economic Development in Historical Perspective', *The Handbook of Globalisation, Third Edition* (Edward Elgar Publishing 2019).

[426] *For explanation on the various rationales for the use and regulation of subsidies, see:* José Guilherme Caiado, *Commitments and Flexibilities in the WTO Agreement on Subsidies and Countervailing Measures: An Economically Informed Analysis* (1st edn, Cambridge University Press 2019) 61–98.

[427] <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2276> accessed 30 April 2021.

the collapse of the Doha Round.[428] Such distortive subsidies invariably affect the livelihoods of people in poorer countries, especially where farming is the main occupation, as the competitive value of their produce diminishes in both their domestic markets and third-country markets. A popular illustration of this is the case study of Haiti, which was at a time self-sufficient in meeting its own agricultural needs but later became incapable of producing enough to feed its people, significantly due to the much cheaper, imported produce from heavily subsidised countries, particularly the United States.[429] While it could be argued that the imported subsidised produce led to cheaper foods for local consumers, it however rendered an extensive number of the country's populace unemployed and impoverished.[430] Similarly, there is also the argument of the international subsidies regime overly restricting the policy space of less-developed countries to adopt certain subsidy measures as a tool to promote essential development objectives.

The debates surrounding the use and regulation of trade subsidies is multistranded. While developing countries and LDCs consistently express their opposition to how subsidies are administered in most industrialised nations, there are also complaints from the same quarters alleging that the multilateral instruments regulating subsidies overly confine their own policy space to employ subsidies as a tool for development. Echoing this view, an UNCTAD Trade and Development Report concluded that the SCM Agreement[431] "impinges directly on national rulemaking authority".[432] Perceiving this claim as an "accusation", the former WTO Director-General Lamy responded:

> The alternative, it seems, would be to have no subsidy disciplines, which raises an intriguing question. Do we want to argue that the best contribution the WTO can

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[428] Alan Beattie and Frances Williams, 'US Blamed as Trade Talks End in Acrimony' *Financial Times.*
[429] Josiane Georges, 'Trade and the Disappearance of Haitian Rice' (2004) 725 TED case studies.
[430] Editorial Board, 'America's Nutty Farm Subsidies Cause Damage at Home and Abroad' *Washington Post* (26 April 2016).
[431] Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1994 (SCM Agreement).
[432] Trade UNCTAD, *Development Report, 2006–Global Partnership and National Policies for Development* (New York: United Nations Publications 2006) 169.

> make to development is to ensure that developing countries have no obligations in this area? Or that export subsidies should be allowed?[433]

It can, therefore, be summarised that the debates surrounding the international subsidies regime are chiefly centred on balancing between the conflicting interests of adopting subsidies to advance domestic interests and preventing that such usage leads to unfair and damaging outcomes for other members of the international trading community. In view of all the above and with the intention of addressing Lamy's intriguing query, the objective of this chapter is, therefore, to critically examine the international legal instruments regulating subsidies, particularly the SCM Agreement, and assess them in light of the equity and development-centred normative principles distilled from the RTD, TWAIL and distributive justice in chapter 3 of this thesis. In doing so, this chapter will provide an overview of the economic and legal understanding of the concept of subsidies and continue with a critical legal analysis of some of the most germane inequities perceived in the SCM Agreement. This will also entail an in-depth legal analysis of some of the SDT provisions contained in Article 27 of the SCM Agreement, with the ultimate view of normatively evaluating how development-centred they are. It is crucial to clarify that this thesis specifically chose to discuss the inequities in the SCM Agreement as its main case study, as opposed to any of the major complaints discussed in section 2.4, because there is limited legal and normative literature on the subsidies regime when compared to other potential trade issues (i.e., dispute settlement, sanitary and phytosanitary measures, and the Agreement on Agriculture). This thesis therefore intends to contribute to this gap in the literature.

4.2. Economic Background on the Use of Subsidies

Considering that the concept of subsidies is primarily, albeit not exclusively, a subject of economics, it is, as such, apposite to begin by providing an economic insight on the meaning, justifications, and some contending perspectives about their usage.

On the definition of the term "subsidies", there is no consensus among economists and policymakers on a specific definition. Attempts at defining the term usually exclude peculiar

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[433] 'WTO | News - Speech - DG Pascal Lamy -Lamy Calls for Debate on "Flexibility" and What Makes Good "Policy Space"' <https://www.wto.org/english/news_e/sppl_e/sppl40_e.htm> accessed 30 April 2021.

characteristics that are deemed to be essential in the contexts of other policymakers or bodies. For instance, while the Oxford English Dictionary defines subsidy as "a sum of money granted by the state or a public body to help keep down the price of a commodity or service",[434] many others would argue that tax concessions are also an effective form of subsidisation.[435] The variation in the conceptualisation of the term is even more obvious in policy literature, as different policymakers (states and international/regional organisations) have used the term to include varying degrees of scope, which usually depend on their policy objectives.[436] This definitional variation is mentioned so as to recognise that subsidy definitions are usually context-specific and that the same country or organisation may adopt a variety of definitions in different contexts, which may be narrower or wider in terms of nature, recipient, objectives and effects of government support.

Nonetheless, some of the attempts made by economists at defining the term subsidy are briefly mentioned below. A classic macroeconomics textbook defines subsidy as a "payment to buyers and sellers to supplement income or lower costs and which thus encourage consumption or provides an advantage to the recipient".[437] A possible objection to this definition may arise from the fact that not all types of subsidies take the form of payment to buyers and sellers. Some subsidies do not involve actual cash outlays, such as government-supported cash reduction for goods or services, tax exemptions, or a government's assumption of contingent liabilities.[438] Furthermore, the definition's limitation of the beneficiaries of subsidies to only buyers and sellers also effectively excludes other classes of potential recipients such as consumers, organised groups of people, and educational institutions. In another somewhat unfussy definition, Chappelow defines subsidy as "a benefit given to an individual, business, or institution, usually by the government [which usually takes] the form of a cash payment or a tax reduction".[439] The adoption of the word "benefit" in this definition, as opposed to "payment" like the former, may be a safer

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[434] The Oxford English Dictionary (OED) is considered here because the WTO Panels and Appellate Body commonly rely on the OED to define the ordinary meaning of words used in Agreements.
[435] Alan O Sykes, 'Subsidies and Countervailing Measures' in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer US 2005).
[436] *For such example, see generally,* Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009); *See also* Marco Slotboom, *A Comparison of WTO and EC Law: Do Different Objects and Purposes Matter for Treaty Interpretation?* (Cameron May 2006) 101.
[437] N Gregory Mankiw, *Principles of Macroeconomics* (7th end, Cengage Learning 2014).
[438] World Trade Report, 'Exploring the Links between Subsidies, Trade and the WTO' (2006) 51.
[439] Jim Chappelow, 'Subsidy Definition' (*Investopedia*) <https://www.investopedia.com/terms/s/subsidy.asp> accessed 30 April 2021.

approach, as it accommodates other forms in which subsidy policies could be implemented. Save for the exclusion of individuals from its potential beneficiaries, *Britannica*, in a similar description as the above, also defines the concept as "a direct or indirect payment, economic concession, or privilege granted by a government to private firms, households, or other governmental units in order to promote a public objective".[440] The encyclopaedia, however, further acknowledges the complication with describing a subsidy due to the multiplicity of subsidy instruments and objectives, as well as the complexity of their effects.[441]

The inability of economists to define the term precisely proves the often quoted statement by Houthakker who wrote: "My own starting point was also an attempt to define subsidies. But in the course of doing so, I came to the conclusion that the concept of subsidy is just too elusive".[442] Thus, in order to avoid most of the conceptual issues surrounding the definition of subsidy, a reasonable approach adopted by some economists is to analyse the concept through a range of characteristics, which could also be context-specific, rather than attempting to pin down a particular overarching definition. From the various attempts made to identify the common features of subsidies, there seems to be agreement on the general idea that "subsidisation involves the government and results in benefits for somebody".[443] This thesis is mostly concerned about the characteristics of subsidies in the context of international trade, which will be analysed in detail in the subsequent sections.

Beyond the definitional issues, subsidies could be implemented through different fiscal techniques, such as direct payment in cash or kind, provision of goods and services to consumers at prices below the market price, the purchase of goods and services by governments at prices above the market price, tax concession, and other similar inducements.

There are also different types of subsidies provided by governments. A common type is production subsidies which are predominantly used in most developed countries. This type of subsidy is used by governments to incentivise suppliers to increase the output of a particular product by

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[440] 'Subsidy', *Encyclopedia Britannica* (2020) <https://www.britannica.com/topic/subsidy> accessed 30 April 2021.
[441] ibid.
[442] Joint Economic Committee of the Congress of the United States) (1972), The Economics of Federal Subsidy Programs: A Compendium of Papers, Part 1 — General Study Papers, U.S. Government Printing Office, Washington, DC. Cited in OECD, *Environmentally Harmful Subsidies Policy Issues and Challenges: Policy Issues and Challenges* (OECD Publishing 2003) 103.
[443] World Trade Report (n 438) 48.

substantially offsetting the production costs or losses. The usual goal of a production subsidy is to expand the production of those chosen products so that it would be promoted by the market without any price increment for the consumers. Production subsidies are usually discussed critically by economic analysts because, in spite of their economic and welfare benefits, they are sometimes capable of creating economic complications such as incentivising producers to overproduce. Overproduction, especially in agriculture, has numerous negative implications such as environmental deterioration,[444] depressing world market prices, unfair trade competition, and poverty in other competing nations.

Another type of subsidy is the consumer or consumption subsidy. This type of subsidy is directly targeted at consumers within a given political setting with the aim of subsidising their behaviours in relation to some prioritised needs. This is usually implemented by governments on the basis of their economic, social and welfare responsibilities to their people so they can meet the most basic living requirements. Examples include food, water, electricity, and education subsidies that are sometimes provided with the aim that everyone, no matter how economically disadvantaged, should have access to such basic amenities.[445]

An export subsidy is another type of subsidy that has generated controversy, especially in international trade negotiations. It is generally described as "a reduction in the cost of exports brought about by a government grant".[446] It could be implemented through reduction of labour cost, export financing, or a more favourable tax treatment among other means.[447] It is worth mentioning that most export subsidies are currently prohibited by WTO law.[448] Other types of subsidies include import, tax, agricultural, employment, oil, healthcare and housing subsidies. Among all the aforementioned types of subsidies, only a few are directly relevant to discussions on international trade.

4.2.1. Economic Rationale for Government's Usage of Subsidies

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[444] Eric Holt-Giménez, 'We Produce Too Much Food - The Green New Deal Can Stop This' (2019) 43 *In These Times*.
[445] Norman Myers and Jennifer Kent, *Perverse Subsidies: How Tax Dollars Can Undercut the Environment and the Economy* (Washington, DC: Island Press 2000) 5.
[446] Donald Rutherford, *Routledge Dictionary of Economics* (Taylor & Francis 2012).
[447] ibid.
[448] SCM Agreement, Article 3.1(a).

There are abundant debates among economists and policymakers on whether the use of subsidy as an economic or social policy is justifiable. Most of these debates (both in favour and against) are usually built on the premises of economic effects, political considerations, as well as socio-economic development theory. The classic free-market economists are generally sceptical about the use of subsidies for various reasons. The foremost reason is that a free-market economy is theoretically understood to be such that the market is substantially free from any government intervention or control, and the prices of goods and services should be determined by the consumers and the open market. As such, decisions relating to the production, distribution and even investment should ideally be determined by forces of demand and supply. Therefore, it is technically understood that a free-market economy should be free from subsidies, and introducing one essentially changes the economic model from a free economy to a mixed economy.

In economic theory, the starting point in analysing the rationale for the use of subsidies is usually through a benchmark economy known as the "perfectly competitive market" or simply the perfect market.[449] The perfect market is an ideal economic situation that has to fulfil certain requirements. Satisfying those requirements will enable the market to reach an equilibrium where the quantity of supplied goods and services will equal the quantity demanded at the current price. Whish and Bailey summarised the requirements of a perfect market as follows:

> [O]n any particular market there is an infinite number of buyers and sellers, all producing identical (or 'homogeneous') products; consumers have perfect information about market conditions; resources can flow freely from one area of economic activity to another: there are no 'barriers to entry' which might prevent the emergence of new competition, and there are no 'barriers to exit' which might hinder firms wishing to leave the industry.[450]

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[449] This benchmark is associated with general equilibrium theory in macroeconomics, which explains the dynamic interaction of demand and supply in an economy with multiple markets and how they eventually culminate in an equilibrium of prices. *For general economic overview, see* Manuel Cardenete, Ana-Isabel Guerra and Ferran Sancho, 'An Overview of General Equilibrium Theory' in Cardenete, Guerra and Sancho (eds), *Applied General Equilibrium: An Introduction* (Springer 2017).

[450] Richard Whish and David Bailey, *Competition Law* (8th Edition, Oxford University Press 2015) 7–8.

The idea is that under the condition of a perfect market, no reasonable case can be made to justify the use of subsidies and introducing any form of government measure, such as subsidies, as such circumstance will be welfare diminishing and inefficient.[451] However, some economists have expressed that the above conditions are very stringent and it is unlikely, if not impossible, that a market structure will satisfy all the conditions, especially in developing countries.[452] As such, economists rely on the existence of "market failure",[453] arising from market imperfection, as sufficient economic justification for government interventions, through means such as subsidies, to improve domestic welfare. Therefore, some economists believe an efficient subsidisation is capable of correcting the market failure and of bringing social and private costs and benefits into alignment. For instance, Bhagwati and Ramaswami argue that production subsidy is the most efficient mode of government intervention in the presence of market failure or domestic distortions.[454] For this purely economic reasoning, authors like Caido have construed subsidisation as "the rational action of benevolent governments seeking to improve the functioning of markets".[455]

Beyond the theory discussed above, another economic justification that is usually provided to support subsidisation is it could be used for the promotion of industrial development. As cited as an example above, Bhagwati and Ramaswami, and some other economists,[456] have argued in favour of domestic subsidies, which is a form of industrial policy intervention, as a means of correcting market failure. This position has been further developed as an argument that international trade treaties should be made flexible enough for governments to have the space to implement domestic subsidies for welfare purposes.[457] Policymakers in developing countries often argue that subsidy is a useful tool to develop their industries, especially agriculture and manufacturing. They also often rely on the 'infant industry argument', which essentially is that

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[451] World Trade Report (n 438) 56–57.
[452] AP Thirlwall, *Economics of Development: Theory and Evidence* (9th ed, Palgrave Macmillan 2011) 307.
[453] Market failure is a market situation characterised by an inefficient distribution of goods and services in a free market economy.
[454] Jagdish Bhagwati and VK Ramaswami, 'Domestic Distortions, Tariffs and the Theory of Optimum Subsidy' (1963) 71 Journal of Political Economy 44, 50.
[455] Caiado (n 426) 80.
[456] Harry Gordon Johnson, *Optimal Trade Intervention in the Presence of Domestic Distortions* (Rand McNally 1963) 10. Cited in Caiado (n 426) 80.
[457] M Bacchetta and M Ruta, 'The WTO, Subsidies and Countervailing Measures' (2011).

less-developed countries will always find it difficult, if not impossible, to develop new industries or diversify their economy in a global arena that is competitive where developed countries also operate, without any form of state intervention. There are some counterarguments against the infant industry argument. Most such counterarguments are premised on the mainstream view that industries may become overly dependent on subsidies, and the receiving industries may as such never attain a competitive level. They also argue that governments providing such subsidy may then be faced with the predicament of either continuing to grant the subsidy ceaselessly, which could amount to an unnecessary burden on the public budget, or abandon the subsidised industry entirely, which could then create unemployment.[458] This claim can be effortlessly refuted in light of several empirical and historical studies that have shown the successful implementation of infant industry polices both in the developed and developing worlds.[459] Apart from the fact that infant industry policies and other protectionist measures were implemented by developed countries in their earlier stages of development, most of the countries that are now classified as "newly industrialised countries", especially in East Asia, achieved rapid economic growth relying on such policies.[460]

Even though critics have maintained that the *laissez-faire* approach, wherein states' intervention will be kept to the minimum remains the best approach, the empirical success of state interventions in some of the East Asian countries is often used to support the subsidisation of infant industries by less developed countries.[461] In Chang's empirical and historical investigation, he argued that even the now developed countries all adopted infant-industry protection policies and other activist industrial policies in their early stages of development, as opposed to what is "currently recommend[ed] to, or even force[d] upon, the developing countries".[462] In his study, which examined the United States, United Kingdom, Sweden, Germany, France, Belgium, Netherlands,

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[458] Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th Edition, Routledge 2012) 11–12.
[459] Ha-Joon Chang, 'Kicking Away the Ladder: Infant Industry Promotion in Historical Perspective' (2003) 31 Oxford Development Studies 21.
[460] World Bank (ed), *The East Asian Miracle: Economic Growth and Public Policy* (Oxford University Press 1993).
[461] For a study on the economic growth and the role of public policy on seven East Asian countries, *see* World Bank (ed), *The East Asian Miracle: Economic Growth and Public Policy* (Oxford University Press 1993).
[462] Ha-Joon Chang, 'Kicking Away the Ladder: Infant Industry Promotion in Historical Perspective' (2003) 31 Oxford Development Studies 21; *See also* Ha-Joon Chang, 'Kicking Away the Ladder–Globalisation and Economic Development in Historical Perspective', *The Handbook of Globalisation, Third Edition* (Edward Elgar Publishing 2019).

Japan, and Switzerland, he mentioned that some of the policy tools that were adopted during their developing phases included export subsidies, conferring monopoly rights, direct credits, tariff rebates and inputs used for exports, as well as support for research and development.[463]

A third rationale for the use of subsidies by governments is to foster the redistribution of economic benefits to achieve equity goals. This is usually to promote social cooperation among members of society by, for instance, favouring regions or groups of people that are economically disadvantaged with specific policies. Even though this kind of policy may not be directly justified in mainstream economic theory, as they might not contribute directly to economic efficiency, they are nonetheless justifiable through other theoretical tools like political, moral and development theories. Redistribution of economic benefits in favour of least-advantaged groups, like minority groups, may be justifiable from the viewpoint of Rawls' difference principle, as discussed in sections 3.3.4–3.3.6 of this thesis. In the context of industries and corporations, this rationale can also be used to justify government's reallocation of resources from declining industries to emerging or expanding ones. This process is known as "adjustment".[464]

Apart from all the above rationales for the implementation of subsidies, another important factor is the political economy argument, even though this justification may be classified under non-economic objectives. The basic assumption is that politicians are typically concerned about the impact of their actions on potential electorates, and might as such prioritise the welfare of certain domestic forces or organised societal groups in allocating economic benefits, such as subsidies. This concern is usually derived from the politician's rational attempt to maximise his/her interest to gain popular support for certain ends or to be re-elected. Therefore, such political concerns will usually influence governments to implement some subsidy measures opportunistically for protectionist purposes and to boost the competitive advantage of domestic firms.[465] It is usual for antagonists of subsidies to rely on the political theories of regulatory capture and rent-seeking as arguments against subsidies, as subsidies potentially create an unholy alliance between big corporations and the state. There are allegations that subsidies incentivise corporations to lobby

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[463] Chang (n 459).
[464] World Trade Report (n 438) 97.
[465] *See generally*, Phillip McCalman, 'Protection for Sale and Trade Liberalization: An Empirical Investigation' (2004) 12 Review of International Economics 81.

governments to shield them from competition, and they, in turn, reciprocate the favour to politicians by advancing their political interests through various means.

Other rationales for the use of subsidies by governments include advancement of environmental conservation, regional development, support of innovations through research and development, national security, response to disasters and pandemics, cultural policies, and for specific industries that are deemed germane by the government (such as agriculture, food and energy sectors).

4.2.2. International Consequences of Domestic Subsidies

As mentioned in section 2.1 of this thesis, the effect of economic activities adopted by a state can no longer be said to be confined to just its domestic territory. In the era of modern globalisation, economic decisions made in one state have implications in others due to the world's interconnectedness. As such, the implementation of domestic policies on the use of subsidies typically has direct or indirect consequences on other international trading partners, and on global welfare more generally. This is based on the predictable assumption that the market of the state is neither totally closed nor totally open to international trade.[466] Economic analysis of the international impact of domestic subsidies is mixed, depending on the nature of the subsidy and the extent of its implementation. In simple terms, while some subsidies may have good economic consequences, some others have far-reaching harmful impacts. For instance, some subsidies are used to protect domestic industries or corporations from foreign competition. Although such protective subsidies may sometimes be justifiable on grounds such as welfare advancement and the development of infant industries by less-developed nations, in a different context (especially when used by bigger economies), they are also capable of leading to unfair competition against other imported goods or services, in the same way as if tariffs or quotas were imposed.[467]

Among the different types of subsidies, export subsidies and production subsidies are of particular significance to the international trading system. As mentioned in section 4.2.1, while the former is contingent upon export performance, the latter is conferred notwithstanding the destination of the

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[466] The predictability is based on the fact that the WTO has 164 Members and 25 observer governments, which essentially is the majority of countries of the world.
[467] Alan O Sykes, 'The Economics of WTO Rules on Subsidies and Countervailing Measures' (2003) 186 University of Chicago Law & Economics, Olin Working Paper 7–8.

output.[468] As for the effect of production subsidies, even though they could lead to the expansion of domestic output, they could also negatively affect foreign producers, leading to loss of market share and profits as a result of the artificially reduced global market price. Similarly, export subsidies could be harmful to producers in importing countries, because the artificial decrease in price induces a reduction in their unsubsidised output, which then leads to a decrease in profit, payment, wellbeing, and even employment.

It is, however, important to also note that subsidies could likewise be beneficial to countries with little corresponding production of the subsidised product or its close alternatives. This is usually the case for importing countries with low levels of self-sufficiency, as their consumers will benefit from the lower prices of the imported goods. In this case, the consumer gains should reasonably offset the possible producer losses. However, in countries where there is a substantial self-sufficiency level of the imported subsidised product or its close substitute, the producers will lose and local investments in those sectors will be undermined. Many developing countries belong to this latter category, especially in relation to basic goods and foods.[469]

In consideration of all the above, the fact that domestic subsidies can affect the global price of goods and services, distress global welfare, and make other countries worse off by displacing their production and exports is sufficient justification for global cooperation on the regulation and control of subsidies under the multilateral trade rules. While such regulation already exists under WTO law, this thesis opines that the existing rules do not adequately address certain values or principles which should be of utmost importance. Mainstream economic theories are also insufficient to address those concerns, as they are mostly less concerned about other "non-economic" social implications that may arise from the use of subsidies, such as fairness and human rights. The next section, therefore, provides a general insight into the existing international legal regime on subsidies, before a critical and normative analysis follows in the later sections.

4.3. Legal Background of Subsidies Regulation in International Trade

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[468] Caiado (n 426) 92.
[469] 'Multilateral Trade Negotiations on Agriculture: A Resource Manual - Agreement on Agriculture - Export Subsidies' <http://www.fao.org/3/x7353e/X7353e03.htm> accessed 30 April 2021.

This section aims to provide an insight into the legal background of the SCM Agreement, being the central multilateral instrument regulating subsidies in international trade relations. For the purpose of contextual appreciation, the section looks into the development of the subsidies discipline in the WTO system. It further considers the legal definition of subsidies and other relevant foundational principles, in accordance with the SCM Agreement and the WTO's jurisprudential interpretations.

4.3.1. Development of the SCM Agreement

From the inception of the first GATT in 1947, the original drafters paid rather trivial attention to trade issues associated with subsidies. The main subsidy provision was embodied in its Article XVI, which was neither well-developed nor imposed any noteworthy commitment on the GATT signatories. It only required that the Contracting Parties should notify "any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory". Beyond the obligation of notification, no form of subsidisation was prohibited or even regulated. Also, if the effect of a subsidy implemented by a Contracting Party was determined to cause serious prejudice or threaten the interest of another contracting party, all that was required was for the subsidising state to discuss with the affected party, with the singular intention of limiting the subsidisation.

Perceiving the above subsidy regulation as inadequate, some additional provisions were introduced in the 1955 Review Session of the GATT to Article XVI, entitled "Additional Provisions on Export Subsidies". The preambular paragraph of the additional provisions, under Section B, acknowledged the increasing concerns about the trade-distortive effects of some types of subsidies, particularly the export subsidies. It provides:

> The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.[470]

[470] GATT, Article XVI: 2.

In introducing a new dimension to export subsidies, the additional commitments of 1955 further distinguished between "primary products" and non-primary products.[471] The primary products were defined to include "any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade".[472] On the other hand, non-primary products were essentially other types of trading products. With respect to primary products, the obligation was for Contracting Parties to "seek to avoid" the use of export subsidies. But whenever used, it should not be applied in such a way that would result in the subsidising nation obtaining "more than an equitable share of world export trade in that product".[473] In relation to export subsidies for other non-primary products, Article XVI:4 prohibited only such subsidies that resulted "in the sale of such product [non-primary goods] for export at a price lower than the comparable price charged for the like product to buyers in the domestic market". While it could be said that something close to a prohibition was imposed on export subsidies in the case of non-primary goods, the same cannot be said in relation to primary goods. All the same, most GATT Contracting Parties failed to comply with these amendments.[474] This non-compliance led to the establishment of a GATT Working Party on Article XVI:4. The Working Party, in 1960, produced a draft declaration giving effect to the provisions of Article XVI:4, with a non-exhaustive list of measures that fall under the prohibition. Unluckily, only 17 Contracting Parties accepted the declaration by the time it came into force in November 1962.[475]

The next major stage in the evolution of subsidies law under GATT was an agreement that was negotiated during the Tokyo Round and entered into force on 1 January 1980. The Agreement is popularly known as the "Subsidies Code". The Subsidies Code confirmed the earlier prohibition of export subsidies on non-primary goods, with a further introduction of an illustrative list of export subsidies. It represents the first express attempt to define subsidies under the GATT system. It also contained some SDT provisions for developing countries signatories. However, like the

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[471] GATT, Article XVI: 3-4.
[472] GATT, Ad Article XVI.
[473] GATT, Article XVI (3)
[474] Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (Cambridge University Press 2014) 25–26.
[475] World Trade Report, 'Exploring the Links between Subsidies, Trade and the WTO' (2006) 190.

amendments to Article XVI, the code was accepted by a limited number of GATT Contracting Parties.

It was not until the Uruguay Round before a detailed and elaborate agreement on subsidies was introduced into the multilateral trading system in form of the SCM Agreement. The SCM Agreement comprises substantial innovations and modifications to both the substantive and procedural aspects of subsidies regulation in international trade law. Specifically, its coverage includes the definition and scope of subsidies within its discipline; the introduction of the concept of "specific subsidies"; the categorisation of subsidies into prohibited and actionable subsidies; the establishment of institutional structure and notification/surveillance modalities for the implementation of the Agreement; and an elaboration on SDT provisions for developing countries. The Agreement also contains substantive and procedural provisions on the implementation of countervailing measures against subsidised imports, as well as provisions on dispute settlement. Unlike the previous GATT provisions, the SCM Agreement became binding on all WTO Members by virtue of the "single undertaking" principle, which essentially requires WTO Members to agree to virtually every item of the negotiation as a whole and indivisible package.

4.3.2. Legal Definition of Subsidies in the SCM Agreement

The legal understanding of subsidies according to the SCM Agreement involves a number of steps and considerations. The overall starting point is Article 1.1 of the SCM Agreement which sets out the indicators for identifying a subsidy. The provision generally describes subsidies as "a financial contribution by a government or any public body within the territory of a Member"[476] and which consequently confers a benefit.[477] This contribution could take the form of a direct transfer of funds, a potential transfer of funds or liability, forgone revenue such as tax credits, the provision of goods and services by a government except for general infrastructure, or the purchase of goods.[478] Furthermore, a subsidy will also be deemed to exist where a financial contribution is indirectly

[476] SCM Agreement, Article 1.1(a)(1).
[477] ibid, Article 1.1(b).
[478] ibid, Article 1.1(a)(1)(i-iii).

implemented by a government through payments to a funding mechanism, or by entrusting a private body to carry out such functions that would ordinarily be vested in the government.[479]

In essence, the major elements for determining the existence of a subsidy are: (a) the existence of a financial contribution, (b) by a government or any public body and, (c) evidence that a benefit is conferred as a result of the financial contribution. In addition to the aforementioned elements, Article 1.2 imposes a further requirement, legally termed as "specificity", before a subsidy matter could become a concern of the SCM Agreement. It reads:

> A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II [on prohibited subsidies] or shall be subject to the provisions of Part III or V [on actionable subsidies and countervailing measures respectively] only if such a subsidy is specific in accordance with the provisions of Article 2.[480]

As such, notwithstanding an actual existence or usage of subsidies within the definition provided under Article 1.1, subsidies can only become an issue under the WTO rules when they are "specific". A brief insight will be provided below on each of the major elements, including the specificity requirement.

4.3.2.1. A "Government" or any "Public Body" as the Granting Authority

The SCM Agreement only seeks to address trade distortions resulting from governmental interventions. However, in order to avoid situations where governments would set up agencies or bodies to indirectly implement impermissible subsidy policies, the SCM Agreement envisages such situation by not just mentioning "a government", but also capturing financial contributions by "any public body". The meaning of a "government" here is not limited to the central government, it is also understood to include sub-national governments, such as provincial, state, local or regional governments, or any other hierarchy of government, depending on the structure provided by the constitution of a country. Hence, in both *US – Large Civil Aircraft (2nd*

[479] ibid, Article 1.1(a)(1)(iv).
[480] ibid, Article 1.2.

Complaint)[481] and *US – Softwood Lumber III*,[482] the cases involved subsidy measures that were originally implemented by sub-national governments (provinces and states) in the US and Canada respectively, and this has not been a contested issue in WTO case law.[483]

On the other hand, a rather controversial issue is what constitutes a "public body". Initially, the phrase was interpreted by the Panel in *US – Definitive Anti-Dumping and Countervailing Duties (China)* to mean "any entity controlled by a government".[484] The Panel, on the basis of this interpretation, held that China's state-owned enterprises and commercial banks constituted "public bodies". This position is also in consonance with the Panel decision in *Korea – Commercial Vessels,* where some government-owned financial institutions were held to be public bodies based on the government's substantial control over them.[485]

However, the Appellate Body subsequently took a more restrictive approach in *US – Definitive*, and instead of "government control", the Appellate Body inclined towards the so-called "government authority" approach, holding that "a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority".[486] The higher threshold of this latter approach adopted by the Appellate Body has raised significant controversy, as there are claims that it could potentially affect the ability of other Members to successfully establish that state-owned enterprises, especially in relation China, are public bodies. Particularly, the possibility of foreign investigating authorities to obtain sufficient evidence to establish such authority still remains a subject of debate.

4.3.2.2. Financial Contribution

In the course of negotiating the SCM Agreement, Members were divided regarding the nature and extent of government interventions that should amount to a subsidy. Some Members contended

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[481] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, WT/DS353/AB/R (2012).
[482] Panel Report, *US – Softwood Lumber III*, WT/DS236/R (2002).
[483] Marc Bénitah, *The WTO Law of Subsidies* (Kluwer Law International 2019) 11. *See also,* Article 30 of the SCM Agreement in conjunction with Article 22.9 of the DSU.
[484] Panel Report, *US – Definitive Anti-Dumping and Countervailing Duties (China)*, WT/DS379/R (2010) para 8.94.
[485] Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R (2005).
[486] Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (2011).

that, for a subsidy to exist, there has to be a charge on the public account. Other Members argued that the definition of subsidy should also include other forms of government interventions that may not involve an expense to the government, but are nonetheless capable of distorting trade competition. Eventually, the SCM Agreement adopted the former approach by specifying "financial contribution" as an essential element in determining the existence of a subsidy. Thus, once it can be ascertained that the granting entity providing a subsidy is either a government or a public body (or a "private body" that has been "directed or entrusted" by the government), what should therefore follow is a determination as to whether the act engaged in amounts to a "financial contribution" within the contemplation of Article 1.1(a)(1) of the SCM Agreement.

As briefly mentioned in section 4.3.2 above, Article 1.1(a)(1)(i) to (iv) of the SCM Agreement mentions situations in which a financial contribution can be said to exist. Such situations include if:

> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.[487]

Various aspects of the above provision have been subject to dispute before panels and the Appellate Body. For instance, regarding the interpretation of "direct transfer of funds" in subparagraph (i), the Appellate Body stated that the phrase entails "conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient".[488] This means that the meaning of "funds" is not limited to only money, but also includes

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[487] SCM Agreement, Article 1.1(a)(1)(i) to (iv).
[488] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para 614.

other types of financial resources.[489] It is also important to note that a subsidy is not only deemed to occur when a direct transfer of funds has been actually effected, rather the mere existence of the commitment or possibility of making such transfer, even without the occurrence of the triggering event, satisfies the requirement.[490]

Similarly, with respect to the interpretation of subparagraph (ii) above, the Appellate Body clarified that revenue "forgone" means that the "government has given up an entitlement to raise revenue that it could otherwise have raised".[491] The Appellate Body further established a normative benchmark to determine what should constitute a forgone tax revenue that is "otherwise due". While acknowledging that this could be a difficult task, especially as it entirely relates to domestic fiscal regulations, the Appellate Body nonetheless gave a vague guide that "the term 'otherwise due' implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situations".[492]

4.3.2.3. The Conferment of Benefit

Establishing that the government or public body has made a financial contribution as described above is not sufficient to conclude on the existence of a subsidy under the SCM Agreement. Article 1.1(b) of the SCM Agreement provides that it is essential that "a benefit is thereby conferred" for a subsidy to exist. While the definition of "a benefit" is not mentioned in the SCM Agreement, the Appellate Body nonetheless generally described it as a situation where the financial contribution has made "the recipient 'better off' than it would otherwise have been, absent that contribution".[493] The determination of this situation is not always clear-cut. Nonetheless, the Appellate Body ruled that in determining if a recipient is better off as a result of a financial contribution, the only logical comparative basis should be what the recipient could have received in the commercial market place

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[489] ibid, 617.
[490] Panel Report, *US – Large Civil Aircraft (2nd complaint),* WT/DS353/R (2011) para 7.164.
[491] Appellate Body Report, *United States — Tax Treatment for "Foreign Sales Corporations",* WT/DS108/AB/R (2000) para 90. This position was reaffirmed in Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint) (Article 21.5),* WT/DS353/AB/RW (2019) para 5.153.
[492] Appellate Body Report, *United States — Tax Treatment for "Foreign Sales Corporations*, para 89-91.
[493] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint),* paras. 635, 636 & 662.

that is relevant to the nature of financial contribution at issue. In *Canada–Aircraft*, the Appellate Body states:

> We also believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.[494]

It is essential to clarify that the market benchmark here can only be determined in relation to "the prevailing market condition of the good or service in the country of provision or purchase".[495] However, this will only be the case when the market price is "unconstrained"[496] in the sense that the price arising from the market must not have been hugely influenced by any role predominantly played by the government. Thus, in a situation where there is no usable market-determined price in the country of provision due to the heavy distortion created by the government, alternative benchmarks could be considered in establishing the existence of benefit.[497]

Notwithstanding the explanation above, there are uncommon situations where the marketplace benchmark will not be required to establish if a financial contribution has made its recipient better off. This can occur if the financial contribution is in the form of forgone government revenue otherwise due or a tax break. Hence, the Panel in *Canada–Renewable Energy* noted as follows:

> We note that to date, the "marketplace" has not been explicitly used as a benchmark to determine whether financial contributions taking the form of the measures described in

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[494] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (1999) para 157.
[495] SCM Agreement, Article 14(d).
[496] Appellate Body Report, *Japan - Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R (2007) para 172.
[497] Appellate Body Report, *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS257/AB/R (2004) paras 100-106.

> Article 1.1(a)(ii) of the SCM Agreement (i.e. where "government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)") confer a benefit.[498]

This is because forgone revenues are essentially a gift from the government,[499] and establishing that a benefit exists in such situations only requires simple logical reasoning.

4.3.3. The Specificity Principle

The establishment of a financial contribution by the government or public body as well as the conferment of benefit might have satisfied the necessary elements for the definition of subsidies. However, the existence of a subsidy itself, even though within the description of Article 1.1, is not sufficient to become subject to the discipline of the SCM Agreement. For a subsidy policy to be subject to the SCM Agreement, such subsidy, in addition to meeting the aforementioned requirements, must also be "specific".[500]

The specificity requirement is laid out in Article 2, which provides the meaning of specificity through the identification of its various forms. The Article generally considers a subsidy as "specific" if its implementation or access is limited to "an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority".[501] Thus, the specificity requirement mainly focuses on whether access to a subsidy policy is targeted at a particular class of recipients,[502] such as companies or producers operating in a particular form or branch of productive labour or trade.

Furthermore, Article 2.1(b) sets out that specificity "shall not exist" where the granting authority, through legislation or any other official document, establishes "objective criteria or conditions" to govern the eligibility for, and the amount of, the subsidy, provided that such eligibility is automatic

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[498] Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector & Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/R & WT/DS426/R (2012) Footnote 509.
[499] Panel Report, *US – Large Civil Aircraft (2nd complaint),* WT/DS353/R (2011) para 7.169.
[500] SCM Agreement, Article 1.2.
[501] SCM Agreement, Article 2.1(a).
[502] *See* Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China,* WT/DS437/AB/R (2014) para 4.169.

and that such criteria and conditions are strictly observed. Therefore, if a subsidy policy is implemented in an economy and neutrality can be guaranteed in relation to the conditions required to access it (i.e., by not favouring certain enterprises over others), such subsidy will not be deemed specific, and therefore cannot be brought within the discipline of the SCM Agreement.

However, given that some governments might attempt to mask some subsidies to specific enterprises by fashioning the "objective criteria or condition" in a manner that only a few enterprises can qualify, Article 2.1(c) requires a review of the actual implementation and results of the measure. Therefore, a policy that appears objective on its face, but results in the conferment of benefits to a targeted enterprise or industry may be found to be specific. Factors that will be taken into consideration in determining such a situation are:

> [The] use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[503]

Apart from the specific subsidies that relate to enterprises and industries, the SCM Agreement also addresses geographic specificity, and specificity arising from the prohibited nature of a subsidy.[504] The former occurs when a government targets particular producers or firms in designated regions within its jurisdiction for subsidisation.[505] As for the latter, Article 2.3 states that any subsidy falling under the prohibited category, as provided for under Article 3 shall also be deemed specific.

In summary, a subsidy may be considered as specific if it is targeted at enterprises, industries, geographical regions, or by being a prohibited subsidy. An explanation will be provided on the prohibited subsidies in section 4.3.4.

4.3.4. Prohibited and Actionable Subsidies

[503] SCM Agreement, Article 2.1.(c).
[504] SCM Agreement, Article 2.2-3.
[505] ibid, Article 2.2.

The SCM Agreement provides for two categories of subsidies: those that are prohibited (and automatically specific) and those that are actionable (i.e., open for legal challenge depending on their impact on other countries). The explanation of these categories is important to this analysis because all specific subsidies fall into one of these categories, which are explained below.

As the name indicates, "prohibited subsidies" are impermissible and should therefore be neither maintained nor granted by any Member.[506] Article 3.1 of the SCM Agreement states the types of prohibited subsidies as follows:

> (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

In essence, two types of subsidies are prohibited: subsidies that are directly tied to the exportation of goods (export subsidies)[507] and subsidy policies that incentivise the usage or consumption of local products in preference to imported products (local content subsidies). If a Member is found implementing any of the mentioned types of prohibited subsidy, such Member shall be directed to withdraw the subsidy without delay.[508]

As for "actionable subsidies", most subsidies, such as production subsidies, fall into this category. While they are generally not prohibited, they are however subject to challenge, either through the WTO dispute settlement mechanism or countervailing action, in the event that their usage causes "adverse effects" to the interest of other Members. Adverse effects can be caused in three main circumstances. The first is if the subsidisation causes injury to the domestic industry of another Member. An "injury" in this context is understood to mean "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry".[509] The establishment of injury must be based on positive evidence, which must take

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[506] ibid, Article 3.2.
[507] While the Agreement on Agriculture is an exception to Article 3 of the SCM Agreement, it is worth mentioning that Members at the WTO's 10th Ministerial Conference (2015) in Nairobi agreed to substantially eliminate Agricultural export subsidies. *See Ministerial Decision of 19 December 2015: WT/MIN(15)/45 — WT/L/980.*
[508] SCM Agreement, Article 4.7.
[509] This definition is provided in footnote 45 in the context of Article 15 of the SCM Agreement; See also Panel Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft,*

into consideration, the volume of the subsidised import, its effect on the prices of similar products in the domestic market, and its effect on the domestic producers of such product. Also, the causation requirement must be established, which essentially requires that the subsidised import must be the direct cause of the injury.[510]

The second possible situation of adverse effect can occur if a subsidy implementation directly or indirectly leads to the "nullification or impairment" of benefits accruing to other contracting Members under GATT 1994. The Panel has interpreted "nullification and impairment" in the SCM context to have the same meaning as the terms in Article XXIII of the GATT and can be evaluated using the approach adopted in relation to the provisions of that Article.[511]

The final way to demonstrate an adverse effect is by showing the existence of "serious prejudice" to the interests of another Member.[512] Article 6.3 of the SCM Agreement states four bases upon which serious prejudice can be established as follows: firstly, if the effect of the subsidy can displace or impede the imports of a similar product of another Member into the subsidiser's domestic market; secondly, if the effect of the subsidy can displace or impede the exports of another Member's similar product from a third country market; thirdly, if the effect of the subsidy leads to significant suppression, depression, undercutting, or lost of sale in any market. Lastly, if a subsidy leads to an increase in the subsidising Member's world market share for a specific primary product or commodity.

It is worth mentioning that the SCM Agreement also has a third category of subsidies known as the "non-actionable subsidies".[513] However, the provision of this category has already expired, as it was enacted only to operate for five years, and it was not extended when its operational time elapsed on 31 December 1999.[514]

WT/DS316/R (2010) para 7.2068, wherein the Panel interpreted "injury to the domestic industry" in Article 5(a) harmoniously with the provisions of Article 15 governing countervailing duty investigations.
[510] SCM Agreement, Article 15.5.
[511] Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, 234 (2002).
[512] ibid, Article 5.
[513] SCM Agreement, Article 8.
[514] SCM Agreement, Article 31.

4.4. Normative Critique of the SCM Agreement

The preceding sections provide insights into the economic and legal context of the SCM Agreement. Keeping the central thrust of this chapter in mind, the succeeding sections will examine some of the major issues concerning the WTO subsidies regulation and practice from the normative lenses already discussed in chapter 3. The justification for a critique of this nature stems from the numerous complaints against the subsidies regime for its contravention of essential normative values such as development, equity, fairness, transparency and human rights.[515]

Abundant development and economic analysis contend that these normative contraventions occur significantly because the SCM Agreement enormously confines the ability of states to adopt policies for industrial development and other non-commercial development purposes.[516] As earlier discussed in 4.2.1, adequate policy space for industrial and other development programmes are even more important in the case of less-developed countries due to their peculiar need to offset market failures and realise crucial welfare objectives. Yet, the complexity of the subsidy discipline has to be recognised, because an unfettered space to use subsidies, especially by the more industrialised economies, is also capable of distorting the market and leading to unfair results for global development and equity. Thus, an ideal subsidies regulation should be one that is able to strike a balance between strong disciplines on trade-distortive subsidies, on the one hand, and the flexibility to use subsidies to achieve legitimate developmental objectives that are peculiar to each country, on the other hand. Alas, the prevailing system operates mainly to advance the primacy of commercialism as its core value, while other non-commercial values are typically treated as peripheral.

The debates on subsidies have been one of the most consistently raised issues in multilateral trade negotiations. The WTO Ministers, at the Doha Development Round, agreed to the following mandate for negotiations:

> In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines

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[515] *See for examples*, Lee (n 425); Chang (n 425).
[516] *See generally:* Chang (n 425).

> under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase.[517]

As a result of the above declaration, different proposals from various Members and negotiating blocs of varying interests were presented. The proposals included different issues such as export subsidies, SDT provisions, the definition of specific terminologies, specificity, export credit and guarantees and the allocation of benefits, among others.

Considering all the above, the remainder of this chapter is divided into two main sections. The current section normatively critiques the SCM Agreement, particularly the prohibited export and local content subsidies through the lenses of the five conceptual principles established in this thesis. Thereafter, the final section explores possible proposals for the operationalisation of those vital "non-trade values" within the context of the SCM Agreement. This thesis clarifies that even though matters concerning agricultural subsidies are central to the complaints of most developing countries, the discussion in this chapter is limited to the industrial subsidies covered under the SCM Agreement. This is because while a significant number of authors have critiqued the Agreement on Agriculture from a developing country standpoint,[518] it is crucial not to neglect subsidies that apply to other sectors, especially as many developing countries are aiming to diversify their economies.

4.4.1. Export Subsidies and the Policy Space Concerns of Less-Industrialised Countries

As a general rule and save for a few exceptions, export subsidies are considered prohibited as mentioned in section 4.3.4 of this thesis. However, it is also well known that export subsidisation can be an essential policy tool to overcome market failures, and could be helpful for the

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[517] Doha WTO Ministerial Declaration, WT/MIN(01)/DEC/1, para. 28.
[518] See for example, Gonzalez (n 148).

development of infant industries, especially in less-developed countries which aim to break into the global market competition. Another often-repeated economic justification of export subsidisation for developing markets is the effect of learning-by-exportation, which is based on the assumption that productivity gains experienced by firms after they commence exporting, due to access to new knowledge and resources, spill over to other segments of the economy. In a World Bank study, the authors called for proactive policies to promote trade and export (diversification) in developing countries.[519] The study argued that selective and functional government interventions, in the form of subsidies, are required to improve export diversification, which has been hampered by severe market shortcomings. The study also argued that the strategy to be adopted should depend on the peculiar characteristics of each country, as "one size does not fit all".[520]

Furthermore, developing countries have consistently emphasised that such market shortcomings are more prevalent in their domestic markets, and export subsidisation will only serve as a tool to level the playing field with exporters from the more industrialised countries. For example, India, in one of her responses to the United States on the subsidies debate, expressed the following:

> Industr[ies] in developing countries are characterised by low level of infrastructure development, high cost of capital, prevalence of under-developed regions where industries may be reluctant to invest etc. The various export incentive schemes in developing countries are less in the nature of conferring an advantage to the exporters in such countries and more for the purpose of creating a level playing field, in view of the fact that their competitors from the developed countries do not suffer from these disadvantages. It has therefore been recognised that governments have to assume a more active role in assisting the industry by creating a level playing field.[521]

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[519] Richard Newfarmer, William Shaw and Peter Walkenhorst, *Breaking into New Markets: Emerging Lessons for Export Diversification* (The World Bank 2009).
[520] ibid 29–30.
[521] India's Replies to Questions from the United States on its submission, TN/RL/W/99, 6 May 2003, p. 5. For an earlier similar position, see also MTN.GNG/NG10/W/33, 30 November 1989, para 7.

Beyond the position of policymakers, several economic findings support the view that export promotion by way of subsidies can be beneficial to developing countries. In a joint economic study conducted by Xiangkang and Xiangshuo, the authors concluded that export subsidies for developing countries have a direct effect on the increment of employment, improvement of domestic productivity, updating technology, and enhancement of welfare under appropriate circumstances.[522] However, because economics is not an exact science, it must also be acknowledged that there are studies that have attempted to establish the contrary about the benefit of export subsidies,[523] especially when inappropriately administered. Nonetheless, overwhelming evidence from practice and empirical studies focused on both industrialised and less-industrialised countries point out that export subsidisation is essential for not just the growth of domestic industries alone, but also for welfare and development objectives.

Despite the general policy space limitations to implement export subsidies in the SCM Agreement, the Agreement still carefully acknowledges this economic argument as it recognises that "subsidies may play an important role in the economic development of developing country Members".[524] It is for this stated purpose that Members agreed on the SDT provisions contained in Article 27 of the SCM Agreement with the aim of creating some policy flexibilities for developing countries. The fundamental question, however, is whether those SDT provisions are actually satisfactory for achieving the economic and developmental goals of their intended beneficiaries. More specifically, an important concern in this research is whether those provisions satisfy the standard of fairness in accordance with the five equity and development-centred normative principles elaborated in chapter 3. There are numerous issues of concern from development and equity perspectives on the SDT provisions in relation to export subsidies – many of which have been discussed by various authors – but a few peculiar ones are analysed in the subsequent sections, due the controversies that they have generated.

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[522] Xiangkang Yin and Xiangshuo Yin, 'Can Developing Countries Benefit from Export Promotion?' (2005) 32 Journal of Economic Studies 60; *For a similar research, albeit centred on Peru, see also,* Christian Volpe Martincus and Jerónimo Carballo, 'Is Export Promotion Effective in Developing Countries? Firm-Level Evidence on the Intensive and the Extensive Margins of Exports' (2008) 76 Journal of International Economics 89.
[523] Such debate was addressed in: Dani Rodrik, 'Sense and Nonsense in the Globalization Debate' [1997] Foreign Policy 19.
[524] SCM Agreement, Article 27.1.

4.4.1.1. The Beneficiaries of the Preferential Provisions on Export Subsidies (Article 27.2)

As an SDT exception, Article 27.2 of the SCM Agreement provides that the prohibition on subsidies contingent upon export performance shall not be applicable to three categories of developing countries. However, only the first two categories of developing countries, which are contained in Article 27.2(a), can benefit from the SDT treatment on export subsidies at present. This is because countries falling under the last category (contained in Article 27.2(b)) were required to phase out their export subsidies programs within eight years from the date the SCM Agreement came into force. Article 27.2 specifically provides the categories of developing countries as follows:

> (a) developing country Members referred to in Annex VII.
>
> (b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

With respect to paragraph (a) above, the developing countries referred to in Annex VII are of two groups, and they are the only two groups that can currently benefit from the SDT provisions on export subsidies according to the Panel's interpretation in *India–Export Related Measures*.[525] They are the Members that have been designated as least-developed countries by the United Nations, and countries in which their GNP per capita has not reached 1,000 USD per annum at the time the SCM Agreement entered into force.[526] The countries in the latter group will, however, also be required to phase out their export subsidies once their GNP per capita has reached 1,000 USD per annum, just like other developing country Members in accordance with paragraph 2(b) of Article 27. Annex VII specifically provides as follows:

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[525] This is the consequence of the Panel's decision in *India – Export Related Measures,* WT/DS541/R, 31 October 2019.
[526] SCM Agreement, Annex VII (a) and (b).

> The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 [on the prohibition of export subsidies] under the terms of paragraph 2(a) of Article 27 are:
>
> (a) Least-developed countries designated as such by the United Nations which are Members of the WTO.
>
> (b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

There was a contention before the Panel in *India – Export Related Measures* on whether an eight-year period will be afforded to those developing country Members listed in Annex VII(b) when they graduate to the category of other developing countries in Article 27.2(b) (i.e. when their GNP per capita reaches 1,000 USD). India argued that the computation of the eight-year period for the transiting Members should commence from the date of graduation from Annex VII(b) and not the date the SCM Agreement came into force. However, the Panel held that "the text of Article 27.2(b) does not leave scope for ambiguity in respect to the end date of that transition period", which essentially runs from January 1995 to January 2003 for all developing country Members.[527] The Panel's position was substantially based on its interpretation of the expression "shall be subject to the provisions which are applicable to other developing country Members" which is contained in Annex VII(b) above. The Panel held that the transiting developing countries essentially have to assume the subsisting applicability of Article 27.2(b) to other developing countries, which has basically expired since January 2003. This, according to the Panel, is because the text of Annex VII(b) does not support the modification of the starting date for the eight-year transition period for those developing country Members.[528]

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[527] Panel Report, *India – Export Related Measures*, 7.3.3.2.
[528] ibid. paras. 7.45 – 7.46.

Although a notification of an appeal on this point of law has been filed by India,[529] the current position of the Panel essentially renders the SDT provision of Article 27.2(b) inoperative. It also robs the group of those developing countries mentioned in Annex VII(b) of the opportunity to benefit from the rights granted to them by the SCM Agreement for the sole purpose of economic development. More essentially, the interpretation of the Panel seemed not to have adequately taken into consideration the centrality of Article 31 of the Vienna Convention on the Laws of Treaties, which requires that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*".[530] The Vienna Convention has attained the status of customary law, and its provisions, particularly Articles 31 and 32, have been recognised in a plethora of WTO rulings as an indispensable instrument for interpreting all WTO Agreements, pursuant to Article 3.2 of the DSU.[531]

In the context of the SCM Agreement, the "object and purpose" of the SDT provisions under Article 27 is the recognition of the crucial role subsidies can play in the economic development programmes of developing nations.[532] Hence, if the eight-year transition period on export subsidies that was granted to the developing countries above the 1000 USD per annum GNP per capita is actually founded on any credible and beneficial economic basis, it, therefore, becomes irreconcilable with the object of the provision if the same differential treatment could not be granted to the transiting developing country Members from the date of their graduation from Annex VII(b). Besides, the interpretation of a treaty should not be so inflexible to the extent that its most basic purpose will be defeated – in the interest of equity. This view is in consonance with the Appellate Body's position in *Japan – Taxes on Alcoholic Beverages*, where it was expressed that:

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[529] *India – Export Related Measures*, Notification of an Appeal by India under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, WT/DS541/7, 22 November 2019.
[530] Vienna Convention on the Laws of Treaties, Article 31 (emphasis added).
[531] See for examples: Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 16; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996.
[532] SCM Agreement, Article 27.1.

> WTO rules are reliable, comprehensible and enforceable. *WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind*. In that way, we will achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.[533]

In support of the above, Article 32 of the Vienna Convention also provides that supplementary means of interpretation may be adopted for the purpose of conforming with the purposive method of interpretation, especially where the interpretation leads to a meaning that is ambiguous, obscure, manifestly absurd, or unreasonable.[534] In the view of this thesis, and taking the above pronouncement of the Appellate Body into consideration, the most equitable approach would be to interpret Article 27.2(b) *mutatis mutandis* in a manner that reflects the peculiar economic circumstance of the transiting Members (i.e. by commencing the computation of their eight-year period from the date they attain the 1,000 USD GNP per capita threshold). Any approach short of that would rather appear to have placed the interest of equity and fairness as inferior.

Another crucial concern about the SDT provisions on export subsidies is that they do not apply to newly acceded developing countries, even if their income level is below the 1,000 USD GNP threshold. This will also be the case for LDCs that will probably graduate to the status of a developing country below the 1,000 USD GNP threshold. This clearly contradicts the stated basis upon which the SDT principles were founded, which is understood to be generally related to the level of income and development of Members. This specific concern had earlier been expressed by Coppens who also counter-argued that "[t]he assumption that original WTO developing countries would have 'paid' for their [SDT] treatment by making deeper concessions fails since newly acceded developing countries have generally made concessions that are far more

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[533] *Japan – Taxes on Alcoholic Beverages,* p. 31 (emphasis added).
[534] Vienna Convention on the Laws of Treaties, Article 32.

extensive".[535] As such, there could be no reasonable development justification for their exclusion from the SDT treatment.

From a critical viewpoint of the five normative principles canvassed in chapter 3, the asymmetries in the original economic and development positions of the WTO Members further strengthens the argument in favour of global distributive justice and, in particular, the difference principle. The objective of the difference principle is clear, in the sense that it seeks to make the least advantaged in the economic and development distribution better off. While it could be argued that the SDT provisions on export subsidies have created a kind of different treatment for those that are least advantaged among the Members of the trading community, the SDT provisions do not seem to operate in a manner that actually seeks to achieve specific development ends beyond the ornamental value of, in most cases, time extensions. SDT provisions should be made to reflect the peculiar economic realities of its beneficiaries. They ought to operate in a way that their actual impact on development, rather than the expiration of time or date of accession to the WTO, becomes the main measure in determining its beneficiaries. The goal of SDT provisions in the context of subsidies ought to be more directed towards remedying the peculiar market failures in the domestic markets of their beneficiaries.

Furthermore, if the primary objective underpinning the practice and policy of the WTO had been more inclined towards development as a fundamental right as argued in section 3.5.1 of this thesis, there would have been the prospect that the Panel in *India – Export Related Measures* would have adopted a development-favourable approach – as opposed to its unfettered commitment to a literal understanding of the text. Finally, the Panel's decision also strengthens the normative argument made in section 3.5.2 on the need to operationalise the SDT provisions in order to live up to their development objectives.[536] This is because Article 27.2(b), as it stands now, benefits no developing country Member of the WTO, nor does it have any prospect that it would benefit those that transit to the same economic position in future.

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[535] Dominic Coppens, 'How Special Is the Special and Differential Treatment under the SCM Agreement - A Legal and Normative Analysis of WTO Subsidy Disciplines on Developing Countries' (2013) 12 World Trade Review 79, 100.

[536] For similar argument on the operationalisation of SDT provisions in this thesis, see also sections 2.2.4 and 3.3.6.

4.4.1.2. Lack of Policy Space for Export Diversification

For the developing countries referred to under Article 27.2(b), the policy space granted to them to use export subsidies for the period of eight years, as differential treatment, is not absolute. It is subject to the condition that "a developing country shall not increase the level of its export subsidies" beyond the existing level from the date the SCM Agreement came into force.[537] This sets a ceiling level of export subsidies based on their export subsidies level in 1986, and bars the use of export subsidies as a policy instrument for those developing country Members who granted no export subsidies as at the date the SCM Agreement entered into force.[538]

The implications of the above limitations are numerous from economic, development and historical perspectives. Firstly, the limitation imposed on the developing countries' ability to expand the scope and level of their subsidies contradicts empirical economic findings that there is need for many of such countries to implement proactive policies to promote trade and export diversification for industrial and economic development.[539] This is particularly more relevant in the case of the less-industrialised developing countries, many of which hardly have a single industry that has attained a competitive level in the global market due to their numerous market shortcomings. This is also related to the issue of development of infant industries, which has earlier been discussed as one of the major economic rationales for the implementation of subsidies. It, therefore, begs the question of whether such an SDT requirement, which has further diminished the policy space for developing countries, actually aims to achieve development as an end.

Another criticism of this requirement is the fact that it sustains the global economic imbalance that had always existed between the developed and the developing worlds, especially those at the economic extremes. This is based on the historical fact that most developed countries had already attained a significant level of economic and development competence, with considerable reliance on tools such as quotas, tariffs, and exports subsidies, for several decades before the SCM Agreement came into force. This period was concurrent with the era in which a considerable

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[537] SCM Agreement, Article 27.4.
[538] ibid. footnote 55. See also, Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, 14 April 1999, para. 7.62.
[539] *See analysis by* Newfarmer, Shaw and Walkenhorst (n 519); Yin and Yin (n 522).

number of developing nations were either directly under colonial rule or still battling their way out of its dominance. Those countries hardly had the luxury of designing any sustainable economic path for themselves, as freedom was their immediate concern. Accordingly, a provision requiring many such countries to remedy their market failures within only eight years, in the face of numerous peculiar post-colonial challenges and without the ability to expand beyond their already insignificant level of export support, does not appear to have taken any development theory or even distributive justice into consideration. The lack of consideration of such legitimate historical concerns in international trade policies forms one of the major planks of TWAIL's critical approach to international economic practice.

It does not require much economic study to observe that the stipulation imposed on developing countries not to expand the scope of their limited export subsidies within the already inadequate eight-year period does not seem to serve the underlying purpose of the SDT provisions, which is economic development. Rather, it only sustains the existing global economic and power asymmetry that will make it difficult, if not impossible, for countries at the lower end of the global economic distribution to be at economic parity with their industrialised contemporaries. One could argue that contrary to the above claim, the reality may differ, as Members (both developed and developing) may sometimes escape these policy space constraints, due to their substantially inconsistent and inadequate compliance with the subsidies notification requirement as stipulated in Article 25 of the SCM Agreement.[540] However, it must be clarified that in practice a Member's action against the WTO-inconsistent subsidy of another Member will most likely emanate from complaints of domestic industries/businesses whose interests must have been directly affected by such inconsistent trade policy, rather than via the notification of Members. Thus, the possible existence of an unchallenged implementation of a WTO-inconsistent subsidy by a less-industrialised Member will most likely be due to its inconsequential effect on the trade interests of other Members – especially the developed countries that have adequate resources to prosecute the claim. Moreover, the mechanisms that hinder the implementation of many development-centred subsidies in less-industrialised countries are far beyond the scope of just the WTO's rules. As

[540] *For analysis on the weak notification of subsidies by Members as expressed by the Subsidies Committee, in compliance with Article 25 of the SCM Agreement, see,* Gregory Shaffer, Robert Wolfe and Vinhcent Le, 'Can Informal Law Discipline Subsidies?' (2015) 18 Journal of International Economic Law 711, 716–717.

mentioned in section 2.2.4, international financial organisations (like the World Bank and the IMF) and wealthier countries do impose and ensure the implementation of further commitments through mechanisms, such as the SAPs, as conditions for aids, loans, and other forms of assistance.

Considering all the above, a possible remedy to this inequity is an argument advanced by Lee, wherein he proposed that the limitations placed on developing countries' to use export subsidies should be discarded, and policy space should instead be granted to them individually to offer a certain amount of export subsidies in accordance with their various developmental levels and needs.[541] While Lee's proposal does not provide much specific detail on how this could be achieved, it nonetheless offers a conceptual guide that is founded on development, which also recognises the different development levels and characteristics of developing countries. He also acknowledged that his proposal still "needs to be further debated with respect to their effect on development".[542]

4.4.1.3. Export Processing Zones and the WTO Rules

In an effort to transform their economies from an import-centric one to a global supply chain based on exports, many developing countries established export development policies that encourage both domestic and foreign direct investments. One of the major policy tools adopted in trying to achieve this objective is the establishment of Export Processing Zones (EPZ), which are a type of Special Economic Zone (SPZ). EPZs are usually established through domestic legislation that grants various kinds of special incentives to corporations of a specific nature, mostly within a defined geographic area within a country. The rules that apply in EPZs typically deviate from the general rules that apply to regular businesses. Such special rules include preferential tax or duty treatment, tax-free importation of production equipment, direct subsidies to enhance infrastructure, a waiver of administrative and property taxes, and a waiver from value-added taxes for transferred goods between designated EPZs.

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[541] *See,* Yong-Shik Lee, 'Facilitating Development in the World Trading System-A Proposal for Development Facilitation Tariff and Development Facilitating Subsidy' (2004) 38 J. World Trade 935; *See also,* Yong-Shik Lee, 'Economic Development and the World Trade Organisation: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in WTO' (2009) 325 Developing countries in WTO Legal System (Oxford University Press, Oxford 2009).
[542] Lee (n 541) 951.

There is no universally accepted definition for EPZs, because their peculiar characteristics sometimes differ depending on the provisions of their enabling legislation. Nonetheless, they all share the common attribute of providing special inducements for corporations to encourage export. A quite consistent definition in the economics literature is according to a World Bank report, which defines EPZs as follows:

> [A]n industrial estate, usually a fenced-in area of 10 to 300 hectares, that specializes in manufacturing for export. It offers firms free trade conditions and a liberal regulatory environment. Its objectives are to attract foreign investors, collaborators, and buyers who can facilitate entry into the world market for some of the economy's industrial goods, thus generating employment and foreign exchange.[543]

That said, it must be noted that the practice nowadays might not actually require firms to be physically present within a physically fenced area – they can merely be designated as an EPZ.

There are numerous development benefits that are derived from EPZs. Such benefits include creation of jobs, increase of foreign direct investment, increase in foreign exchange through expanded exports, the introduction of technology, and creating backward linkages from the EPZ to the local economy. As a practical example, the EPZs in Nicaragua accounted for 50 per cent of the county's total exports, and nearly 90 per cent of its manufacturing exports in 2010. The government also reported that, in the same year, jobs created through EPZs represented 25 per cent of the country's total formal work, with firms directly employing an average of 7.5 per cent of the total labour force of the municipalities where the EPZs are located.[544] Theoretically, these benefits should also lead to an increase in the welfare of the country's population. However, while EPZs are generally considered as an adequate sustainable economic development strategy to attract FDIs and increase exportation, most of the incentives administered by EPZs, such as rebates offered to exporters and tax waivers, are understood not to be in conformity with the SCM Agreement. This

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[543] The World Bank (ed), *Export Processing Zones* (1992) 20 Policy and Research Series, 7.
[544] Data obtained from the *Comisión Nacional de Zonas Francas* (CNZF) and Nicaragua's Central Bank (BCN), Cited in Nathalie Picarelli, 'Who Really Benefits from Export Processing Zones? Evidence from Nicaraguan Municipalities' (2016) 41 Labour Economics 318, 319.

is because they are mostly subsidies contingent upon export performance, which are generally prohibited according to Article 3.1 of the SCM Agreement.

Nonetheless, many developing countries were able to use EPZs due to the SDT exceptions granted under Article 27.2 of the SCM Agreement. Even EPZs in developing countries that were neither LDCs nor had a GNP per capita of less than 1,000 USD were sometimes granted ad hoc extensions by the WTO Committee on Subsidies and Countervailing Measures (SCM Committee) pursuant to Article 27.4 of the SCM Agreement. However, the SDT exception for such developmental policy space was constrained when the SCM Committee decided to phase out its practice of granting extensions to developing countries that are not listed in Annex VII. A final deadline of December 31, 2015, was set for making EPZ regulations in these countries WTO-compliant.[545] Making EPZs WTO-compliant essentially means that most of the export promotion policies, such as direct tax waivers, must be stopped – and these are the most fundamental basis of EPZs. Different proposals have been offered as ways for developing countries to amend their EPZ regulations to avoid a breach of the SCM Agreement, but many of these proposals are either inadequate to meet an equivalent development need or are even questionable in light of the strict reading of the SCM Agreement.[546]

The decision of the Subsidies Committee seems to have extinguished the operationalisation of the SDT provision in Article 27.4, which permits the Committee to extend the period within which developing countries may subsidise their exports, based on their peculiar economic, financial and development needs. This SDT provision, according to its clear text, was originally not made to be time-bound, but instead subject to the economic and development conditions of Members. The decision of the Committee to impose a general final deadline does not appear to have taken such germane conditions as its primary consideration. A development-consistent approach would rather have been for the Committee to objectively assess the applications for extension of the usage of EPZs on the basis of peculiar conditions and needs of each country, rather than terminating an empirically proven tool to achieve economic development in those countries. As mentioned in section 4.4.1.1 above, it is even more concerning from a critical view of development and equity

[545] G/SCM/120, Decision of Committee on Subsidies and Countervailing Measures of 13 July 2007.
[546] *See e.g.* James Waters, 'Achieving World Trade Organization Compliance for Export Processing Zones While Maintaining Economic Competitiveness for Developing Countries' (2013) 63 Duke Law Journal 481.

that the newly acceded Members, many of which had GNPs below 1,000 USD in 1990 dollars, were generally required to eliminate all export subsidies as a condition of accession and could not benefit from any of the SDT treatments under Article 27. Such countries include Albania, Armenia, Tonga, Georgia, Macedonia, Moldova, Mongolia, Kyrgyzstan, and Vietnam.

The central argument here is the lack of consistency in the WTO's development policies with respect to export subsidies, as they do not appear to be administered in a way that actually seeks development as an end that must be achieved. Otherwise, a relevant question would be to ask what alternative development policies are in place for those countries that their position has not been better-off, but still have to eliminate their existing export promotion policies, only because their time is up. This shortcoming emphasises the need to reassess the philosophy of development in international trade relations by making development more central to its policymaking. As consistently argued in different sections of this thesis, if development were to be considered as a fundamental right as declared in the UNDRD, as opposed to a mere policy that could be taken into account or not, it would have been central to the decision reached by the Subsidies Committee – and probably taken into consideration in the case of the newly acceded developing countries.

Furthermore, as for those limited developing countries that meet the requirement in Annex VII, and are, as such, still exempted from the prohibition on export subsidies, their differential treatment is still constrained by the fact that such subsidies (if granted) remain actionable and therefore countervailable (when they are above the de minimis thresholds set out in Article 27.10 of the SCM Agreement).[547] The economic and development significance of export promotion policies to these countries (LDCs and countries with their GNP below 1,000 USD) should be a basis to call for the limitation of the scope in which actionable subsidies claims could be brought against these countries. Also, the threshold in which unilateral countervailing actions could be taken against them needs to be raised. This position is consistent with the proposals of a number of authors on trade and development, such as Lee, as mentioned in section 4.4.1.2 above. Lee proposed a class of subsidy known as "development facilitation subsidies".[548] This proposed class of subsidy would exempt developing country Members with justifiable development concerns from any potential

[547] *See* SCM Agreement, Articles 27.7 and 27.10. Recall also that export subsidies are generally deemed to be specific as per Article 2.3 SCM Agreement.
[548] Lee (n 541).

multilateral or unilateral actions, which could be in form of actionable or prohibited subsidy claims, or countervailing duties. This kind of policy space, coupled with other internal measures, is believed to be capable of helping many developing countries achieve the same development outcome as the "East Asian Miracle", as canvassed by the World Bank Report.[549] Otherwise, the current WTO rules and interpretation on subsidies, including the SDT provisions, glaringly lack the ability to tackle any development challenge of the developing country Members. As Rodrik rightly puts it, "the SCM Agreement must be judged to have made a significant dent in the ability of developing countries to employ intelligently-designed industrial policies".[550]

4.4.2. Local Content Measures and the Policy Space for Development Objectives

Just as in the case of export subsidies, all subsidies that are contingent upon favouring the usage of domestic goods over imported ones (commonly referred to as "local content subsidies") are generally prohibited.[551] This prohibition is an offshoot of the neoliberal economic theory[552] that emphasises that a more liberalised international trade, without any form of government intervention, will lead to improved efficiency – which is consequently expected to increase prosperity and development in the participating countries. However, this dominant position has been challenged multiple times by development economists and developing countries, who argue that local content policies are an essential development stimulant, especially in developing infant industries.[553] They also often point out that local content policies, such as import substitution industrialisation, was one of the major development policy strategies that was initially implemented by the majority of the now industrialised and wealthy countries before they attained their current development levels.[554] While advancing the infant industry economic theory in a UNCTAD discussion paper, Shafaeddin elucidates that "[w]ith the exception of Hong Kong, no

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[549] World Bank (n 460).
[550] Dani Rodrik, 'Industrial Policy for the Twenty-First Century' (Harvard University, John F Kennedy School of Government 2004).
[551] SCM Agreement, Article 3.1(b).
[552] It has been mentioned in various sections of this thesis that the neoliberal economic theory is the theoretical basis for the present international economic and trade regime. See Sections 2.2.4, 2.5, and 3.4.2.
[553] This argument is mostly built upon the Prebisch–Singer theory in Development Economics, which posits that developing countries would benefit more from fostering their infant industries behind protective economic walls, such as import substitution industrialisation.
[554] Sebastian Edwards, 'Openness, Trade Liberalization, and Growth in Developing Countries' (1993) 31 Journal of Economic Literature 1358.

country has developed its industrial base without resorting to infant industry protection. Both early industrialized and newly industrialized countries applied the same principle, although to varying degrees and in different ways".[555] It is also relevant to add that some developed countries, like the United States, still adopt some protectionist policies as part of their economic recovery strategies.[556]

Such historical and empirical fact is more reason why less-industrialised countries express scepticism towards the constraints imposed on local content subsidies by the multilateral trading agreements. Considering the scepticisms and the divergent positions, this section aims to normatively critique the provisions of the SCM Agreement that relate to local content subsidies from the critical lenses of the RTD, TWAIL, and distributive justice, with particular emphasis on the five conceptual principles that were derived therefrom in the previous chapter.[557] This critique also entails a critical assessment of the SDT provision that the SCM Agreement provides to aid the economic development of developing countries.

In terms of the structure of this discussion, the next sub-section provides a general insight into the economic and development context of local content subsidies. Thereafter, the subsequent sub-section analyses and critiques the relevant legal provisions from the aforementioned critical lenses. Furthermore, even though there are overlaps in both their legal regimes and practice, it is important to make clear that the primary focus of this critique (particularly the legal discussion) is on the local content policies in the context of the industrial subsidies covered by the SCM Agreement, and not so much about the local content requirements in investment legislation that is mainly covered by the TRIMs Agreement and other investment agreements.

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[555] Mehdi Shafaeddin, 'What Did Frederick List Actually Say? Some Clarifications on the Infant Industry Argument' (United Nations Conference on Trade and Development 2000) 149 2.

[556][556] A recent example is the Executive Order signed by the United States' President aiming to encourage and enforce the purchase, procurement and hire of local products and services (also known as the "Buy American Policies"). *See* 'Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers' (*The White House*, 25 January 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/> accessed 30 April 2021.

[557] The five conceptual principles distilled from RTD, TWAIL and Distributive Justice are as follows: Development as the central objective of international trade policies; Operationalisation of differential treatment in trade policies; Mainstreaming human rights in international trade policies and agreements; Equality of participation and transparency in international trade practice; and the expansion of global social responsibility. *See generally,* Section 3.5.

4.4.2.1. Economic and Development Context of Local Content Policies

Local content policies are a variety of measures imposed by governments (usually under specific law or regulations), which require foreign investors or businesses to procure certain goods and services (or up to a minimum threshold) from the domestic market of a country. Such policies may also involve the protection and incubation of newly established domestic industries until their production capacity develops to a level that they can compete with imported goods. The policies aim to more "actively embed foreign investment in, and catalyse spillovers into and linkages with, the domestic economy".[558] There are varieties of local content policies that are implemented by governments. Such policies include the implementation of import substitution policies and measures that encourage or mandate businesses to make use of a certain quantity of local resources in their manufacturing process, or even while rendering services. In the investment context, it may include other measures such as joint venture requirements, local management requirements, regulations requiring firms to have a certain share of domestic ownership, and technology transfer requirements.

The primary objective of local content policies is to establish linkages between foreign investments and local economies in a manner that will promote domestic development.[559] These policies also help in building local skills and capacity, creating employment, boosting research and development in the host country, and promoting technological transfer between foreign and domestic corporations.

The usage of local content policies is quite controversial among economists and policymakers. Proponents of such policies (particularly the developing countries and development economists) usually invoke the "infant industry theory" in advancing their arguments. They opine that less-industrialised nations should be able to implement the policies in order to be able to protect and strengthen their domestic industries until they are developed enough to compete in the global

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[558] Lise Johnson, 'Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate' [2016] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH 7.

[559] *See generally*, WTO/UNCTAD, Trade-Related Investment Measures and Other Performance Requirements, Part II, Evidence on the Use, the Policy Objectives, and the Impact of Trade-Related Investment Measures and Other Performance Requirements, Joint Study by the WTO and UNCTAD Secretariats, Document G/C/W/307/Add.1 (2002).

market. They claim that, without such measures, the less-developed infant industries in their various jurisdictions will be unable to compete with foreign firms – and this could even lead to the collapse of those industries.[560]

In contrast, opponents of the policy space to use local content policies often argue that such policies have the capacity to produce economic inefficiency, which may discourage foreign investors from investing in a country.[561] According to them, measures that compel companies to use domestic inputs affect free trade and restrict access to global markets, and also translate to a higher burden on the national budget. They also argue that local content requirements that limit the ability of investors to use goods from any origin have the capacity to raise the production cost of companies, which could therefore lead to higher costs for local consumers.

An obvious observation from the position of the opponents of local content policies is that their arguments are mostly hinged on the survival of foreign industries and the free trade idea, as opposed to other considerations, such as the development of local industries, employment opportunities, regional development, and other development agendas. On the claim that it could lead to a higher burden on the national purse, a counterargument is that there is nothing abominable in directing the national finance towards policies that will increase employment and welfare for its taxpayers. It, therefore, appears that the conflicting views mainly arise due to the fundamental differences in the values that are deemed as most crucial by the opposing sides. While the proponents are considerably concerned about the development implications of the policies in relation to human rights, welfare, employment, and the growth of local industries, the opponents, in a classic neoliberal fashion, are primarily basing their arguments on the hindrance that such policies can create for the flow of trade and other purely commercial goals.

Overall, this thesis acknowledges that this debate is a complex one and that both sides raise important issues that need to be considered in shaping trade policy. Nonetheless, this thesis is more inclined towards adopting the argument of the proponents of local content policies, because their values and considerations significantly align with the normative principles that have been earlier

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[560] See generally, section 4.2.1 on the infant industry argument as a rationale for subsidies implementation.
[561] Trebilcock, Howse and Eliason (n 458) 11–12.

proposed as key elements for an ideal international trade policy. Determining whether a local content policy is beneficial or not ought to be context-specific and countries should have the ability to make such decisions, depending on their development peculiarities. As Johnson explains:

> Whether local content requirements are good policy tools depends on the nature of the requirement, the fit between the requirement and its intended purpose, the circumstances in the host country, the needs and characteristics of the relevant firms, and the drivers behind those firms' decisions to invest abroad. The issue is much too nuanced and context specific for there to be a simple rule on whether, when and how a government should employ many of these tools.[562]

In advancing the argument in favour of local content policies and their relevance to development, especially for the less-industrialised countries, some authors have highlighted the intersection between such policies and some of the United Nations' 17 Sustainable Development Goals (SDGs).[563] Of specific relevance to the development benefits of local content policies are SDGs 8, 9, and 10.

SDG 8 concentrates on promoting "sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all".[564] This SDG has twelve SDG targets, among which at least four are relevant to the development issues associated with local content policies. For example, target 8.3 of SDG 8 aims to "[p]romote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, *and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services*".[565] Achieving this SDG and the target will require policies that would help domestic firms expand and integrate into global value chains. This entails policies that can address potential market shortcomings that could lead to disadvantageous outcomes for industries and suppliers as a result of foreign competition. Consequently, an identified economic tool in achieving this is implementing adequate local content policies that are capable of promoting

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[562] Johnson (n 558) 8.
[563] *See generally,* Johnson (n 558).
[564] United Nations General Assembly Resolution, *Transforming Our World, the 2030 Agenda for Sustainable Development,* A/RES/70/1, (2015), 8.
[565] ibid, Target 8.3 (emphasis added).

economic diversity, as well as the diversity of suppliers and employees. Possible local content policies that may be adopted in this instance include incentivising the use of local goods, labour and services, providing direct financial support for micro-, small- and medium-sized businesses to support their development, and incentivising the training and employment of qualified domestic labour, among others.

Similar to the above, SDG 9 also focuses on how to "build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation". This goal is essentially a restatement of the chief purpose why less-industrialised jurisdictions advance the infant industry argument in relation to the policy space for local content measures and other economic development policies. Some of the most relevant targets of this SDG are as follows:

> 9.1. Develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all.
>
> 9.2. Promote inclusive and sustainable industrialization and, by 2030, significantly raise industry's share of employment and gross domestic product, in line with national circumstances, and double its share in least developed countries.
>
> 9.3. Increase the access of small-scale industrial and other enterprises, in particular in developing countries, to financial services, including affordable credit, and their integration into value chains and markets.

All the above are essentially pointing out the need to implement industrial policies for infant industry development. In achieving the above SDG targets, various local content policies can be adopted. For example, concerning target 9.1, some authors have proposed policies requiring businesses (both foreign and domestic) to invest in developing infrastructures that are connected with their projects.[566] Similarly, achieving target 9.2 requires government policies to increase the

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[566] *For examples, see,* Perrine Toledano and Clara Roorda, *Leveraging Mining Demand for Internet and Telecommunications Infrastructure for Broad Economic Development: Models, Opportunities and Challenges* (Columbia Centre on Sustainable Investment 2014); Perrine Toledano and others, *A Framework to Approach Shared Use of Mining-Related Infrastructure* (Columbia Centre on Sustainable Investment 2014).

diversification of domestic production through obliging and incentivising the usage of local providers of goods, services, and labour.[567] Target 9.3 is essentially encouraging direct financial and technical aid, particularly for small-scale and other similar businesses, to develop their capacity for integration into global value chains.

Lastly, in relation to the intersection between the space to implement local content policies and the sustainable development goals, the relevance of SDG 10, which focuses on how to "reduce inequality within and among countries" cannot be overemphasised. Even though it could be argued that there has been a decline in global poverty in recent decades, mainly due to the economic developments in China, some analysis still points out that developing countries today are "more unequal than three decades ago".[568] Similarly, the inequality within wealthy countries increased everywhere over the 1970-2010 period.[569] While there are many complex factors that are responsible for the increasing inequality, recent data on global value chains has triggered an increased analysis of how the extent of integration into global value chains contributes to the rising patterns of global inequality.[570] In advancing the development objective of SDG 10 in this context, authors have proposed the need to implement policy measures that can address the inequality and development issues that are arising from global value chains, and can consequently assist less-industrialised jurisdictions to properly integrate into, and reap the benefits of, the global value chains.[571] Some of the identified policies in achieving this aim, especially in the context of developing countries, include adopting adequate local content policies that will promote or require the usage of domestic goods, services, and labour.[572]

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[567] Johnson (n 558) 12.
[568] Facundo Alvaredo and Leonardo Gasparini, 'Recent Trends in Inequality and Poverty in Developing Countries' in Anthony B Atkinson and François Bourguignon (eds), *Handbook of Income Distribution,* vol 2 (Elsevier 2015).
[569] Salvatore Morelli, Timothy Smeeding and Jeffrey Thompson, 'Post-1970 Trends in Within-Country Inequality and Poverty: Rich and Middle-Income Countries' in Anthony B Atkinson and François Bourguignon (eds), *Handbook of Income Distribution*, vol 2 (Elsevier 2015) 1.
[570] Javier Lopez Gonzalez, Przemyslaw Kowalski and Pascal Achard, 'Trade, Global Value Chains and Wage-Income Inequality' (OECD Publishing 2015) 182.
[571] UNCTAD, 'World Investment Report 2013: Global Value Chains: Investment and Trade for Development', *United Nations Conference on Trade and Development* (2013) 177–191; This position is also relevant to the United Nations' 2030 Agenda for Sustainable Development Goals, Targets 10.2, 10.3 and 10.4.
[572] Isabelle Ramdoo, 'Resource-Based Industrialisation in Africa: Optimising Linkages and Value Chains in the Extractive Sector' [2015] European Centre for Development Policy Management Discussion Paper.

All the above might seem to be encouraging a form of protectionism, which contradicts the prevailing neoliberal economic theory of unhindered trade and investment flows. However, arguments from development economists and other similar experts, as mentioned earlier, point out that only such policies can be capable of uplifting industries in the less-industrialised jurisdictions from their current development status. Moreover, the use of the local content policies is not meant to be perpetual, as the objective is to grant those countries sufficient policy space until such time when their market failures will be remedied, and their industries (in specific sectors) are globally competitive. This is in line with empirical economic studies and will also serve development objectives.

The objective of the above analysis is to establish the economic and development foundation for the use of local content policies, and for how such policies are capable of achieving global development objectives in a sustainable way. Notwithstanding the mentioned development benefits, particularly in the context of the less-industrialised jurisdictions, countries are still constrained from implementing a significant number of local content policies due to their commitments under the WTO agreements. The next section will, therefore, normatively critique the legal limitations imposed on the space to adopt development policies under the SCM Agreement.

4.4.2.2. Critique of the SCM Agreement on Local Content Subsidies

As a general rule, the SCM Agreement prohibits Members from implementing any form of subsidy that is "contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods".[573] However, as a differential provision for developing countries, Article 27.3 provides that "the prohibition of paragraph 1(b) of Article 3 [on local content subsidies] shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement".[574] If computed from the date the SCM Agreement entered into force, the

[573] SCM Agreement, Article 3.1(b).
[574] ibid. Article 27.3.

operationalisation of this SDT provision elapsed in the year 1999 for developing countries and 2002 for the LDCs.

From a critical development and human rights perspective, the relevant question to ask is whether the SDT provision has sufficiently realised the development objective that it supposedly sets out to achieve. This could entail querying whether the SDT provision has been able to significantly offset the market failures[575] that arise as a result of trade liberalisation and specifically the global value chains. It is also relevant to enquire whether the implementation of the SDT provision has led to the development of the most crucial infant industries in the various applicable jurisdictions, and whether it has made domestic industries in those jurisdictions competitive in the global market. Furthermore, since the basis upon which the SDT is granted is supposedly due to the various countries' development capabilities, one must query the extent to which the temporary SDT provision has been able to improve their development levels. For instance, LDCs are classified as such on the basis of their low national incomes, weak human assets and high economic vulnerability.[576] Therefore, a realistic development focused SDT provision should be primarily concerned about when and how those identified vulnerabilities are remedied, as opposed to generalised temporary exemptions that are hardly founded on any objective development criteria. From a critical perspective, it seems that such SDTs mainly serve the purpose of expediting a headway with trade negotiations, rather than setting out to achieve definite development goals. The key argument of this thesis is that SDT provisions should be made and evaluated based on their ability to stimulate development according to the peculiar circumstances and needs of various countries at a specific time. Otherwise, the policy space constraints imposed by the WTO (including the limited SDT provisions) will continue to be incompatible with an objective understanding of the connection between trade policies, development strategies (for industrial and human developments), and the realisation of fundamental human rights.

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[575] Market failure is relevant here because it is one of the major economic rationales for the use of subsidies. See section 4.2.1.

[576] 'LDC Identification Criteria & Indicators | Department of Economic and Social Affairs' (4 March 2010) <https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-criteria.html/> accessed 30 April 2021.

As already demonstrated under various sections of this thesis,[577] the general idea of incorporating SDTs into the WTO framework can be justified on the basis of human rights and political philosophy, as well as the five conceptual principles that form the basis of this critique. However, many SDT provisions suffer significant pragmatic and normative challenges, as they are either unenforceable or are incapable of impacting the development status of their beneficiaries. This normative and pragmatic problem underlines one of the main contentions of this thesis, and particularly the relevance of the five conceptual principles it proposes for the realisation of global economic justice.

For instance, the existence of ineffectual SDT provisions, particularly in the context of local content subsidies, exposes the contradictions between the theoretical underpinnings of WTO law, on the one hand, and human rights and development concerns, on the other. It shows that development is not as central to the philosophy of international trade policies as much as the neoliberal free-trade capitalism. This is contrary to the first key conceptual principle, which emphasises making development the central objective of international trade. Otherwise, an essential economic tool that is vital for industrial and human development in certain jurisdictions would not have been forsaken for the sole purpose of an open market idea. Although, the Appellate Body in *US – Tax Incentives* made clear the extent of the policy space constraint on the implementation of local content subsidies as follows:

> Article 3.1(b) does not prohibit the subsidisation of domestic 'production' *per se* but rather the granting of subsidies contingent upon the 'use', by the subsidy recipient, of domestic over imported goods. Subsidies that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement.[578]

Some analysts could rely on this considerable permissibility of domestic subsidy (for all Members) to justify the prohibition on the policy space for local content subsidies. However, such an argument will not be of much help in the context of economic development for less-industrialised

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[577] See for examples, Sections 3.3.6 and 3.5.2.
[578] Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R, 4 September 2017.

nations for multiple reasons. Firstly, granting domestic subsidies alone is incapable of developing infant industries to the extent that can make them attain global competitiveness. Such subsidies will likely be a waste of resources if the infant industries will still have to compete against bigger, and perhaps subsidised, foreign or transnational corporations. It is also important to note that the extent of domestic subsidies that can be granted by many less-industrialised countries is minimal due to their limited economic and financial status. For instance, less-industrialised countries like Chad, Niger, Fiji or Haiti already have a limited economic capacity, and as such are incapable of granting any significant domestic subsidy in the first place. The most pragmatic industrial policy option for such countries still seems to be to implement policies to incentivise the use of target domestic products against well-established foreign products – as was the case in the developing phases of most of the industrialised countries.

Secondly, pursuant to Article 2 of the SCM Agreement, domestic subsidies to industries are generally specific subsidies, and if granted, can still be subjected to unilateral countervailing actions, if any Member deems that the implementation of such subsidy causes an adverse effect on their interest.[579] Therefore, the idea of domestic subsidies as an alternative to local content policies, such as import substitution industrialisation, is not satisfactory. Moreover, they do not serve the same purpose, because local content subsidies also serve the purpose of protecting vulnerable domestic industries from unfair competition (in addition to boosting industrial capacities).

To solve this kind of problem, a significant reconsideration of the fundamental values upon which the multilateral trading regime rests upon is required. As discussed in chapter 3, development should be the central objective of international trade policies. The WTO's trade policy is underpinned by what Dunoff describes as the "efficiency model" of Riccardo's theory of comparative advantage.[580] The model obdurately commits to the view that liberalised international trade leads to increased efficiency, which should therefore lead to increased development and fortune in the participating countries. On the other hand, development economists, such as Hettne, argued that the efficiency model had not been applied in the "pure" sense in the previous GATT

[579] As for developing countries, this could apply when they are above the de minimis thresholds set out in Article 27.10 of the SCM Agreement.
[580] JL Dunoff, 'The Death of the Trade Regime' (1999) 10 European Journal of International Law 733, 737.

of 1947,[581] which also sought to enhance development and prosperity through a considerable reduction of trade barriers. He argued that the GATT 1947 was drafted in a Keynesian theoretical environment, which favoured a mixed economic model wherein governments had significant roles to play in guaranteeing economic stability and development. As such, development was understood by the drafters to be a national process in which countries are required to play a role in its planning and financing.[582] This fundamentally differs from the prevailing neoliberal model which has shrunk the ability of states to implement developmental policies, and instead encourages total reliance on the corporation-driven global marketplace to influence development and prosperity. Stating the above is not an attempt to absolve the GATT of its inadequacies, but to point out the possibility of adopting a different economic model that would be more compatible with global developmental agendas.

In terms of the theoretical lenses and the five conceptual principles discussed in chapter 3, it is clear that the current approach to local content subsidies is not consistent with the first suggested principle, i.e. that development should be the central objective of international trade. The principle particularly discussed the critical need to reconsider how international trade policies are thought about, especially with respect to the values and objectives it prioritises. In a hypothetical multilateral trading system that has imbibed development as its dominant objective, the policy dilemma of having to decide on which prevails between different competing values (such as trade liberalisation) and development objectives can hardly arise. In such a hypothetical system, SDT provisions would be designed primarily towards facilitating well-defined development and welfare objectives of all Members, rather than the present emphasis on their expiration date or their restricted operationalisation (such as Article 27.3 of the SCM Agreement). Beyond the integration of development as an objective of trade policy, development should also be adopted as a fundamental human right by the WTO, based on the UNDRD and as emphasised in the third conceptual principle of this thesis, which argues for the mainstreaming of human rights in international trade policies and agreements. Such recognition would mean that trade policies should not require Members to abide by policies that could exacerbate global economic inequality

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[581] Björn Hettne, 'Current Trends and Future Options in Development' [2002] The Companion to Development Studies, Hodder Headline Group, London 8.
[582] Björn Hettne, *Development Theory and the Three Worlds: Towards an International Political Economy of Development* (2nd ed, Longman Scientific & Technical; Co-published in the United States by John Wiley 1995) 40.

or cause rights retrogression. The international trading system should rather aid states in stimulating their various development objectives, while respecting, protecting and promoting their social, cultural, economic, political and civil rights in advancing global social responsibility as discussed under the fifth conceptual principle of this thesis.

4.5. Operationalising Development-Centred Approaches in the International Subsidies Regime

The previous section demonstrates some of the inequities in the WTO subsidies regime by critiquing the two prohibited subsidies in the SCM Agreement (export and local content subsidies) through the lenses of the development-centred normative principles established in chapter 3. The section also entails various normative arguments on why the SCM Agreement does not adequately serve the interests of equity and development. In addition, it relied on economic theories, such as the infant industry theory, in justifying the need to reassess the existing limited space for developing countries to adopt policies for industrial development and other peculiar development priorities. With the relevance of the five normative principles to the international subsidy regime having been established, this section will therefore explore some pragmatic ways in which equity, fairness and development concerns could be better integrated or operationalised in relation to the regulation of subsidies in the multilateral trading system.

Controversies as to whether the institutions overseeing the multilateral trading system, such as the WTO, should be concerning themselves with matters pertaining to development, human rights and other "non-commercial" concerns have already been well-debated.[583] It may now be considered unfashionable to stick to the old argument that the main objective of the trading institutions is trade liberalisation as opposed to development. However, while the argument in favour of development as a major trade objective has gained considerable prominence at the conceptual level, these ideas are still yet to be properly translated into practice, as this thesis has demonstrated through the analysis of trade policies and agreements. In essence, the operationalisation of development concerns in WTO practice is still largely underdeveloped.

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[583] See section 3.2.6 for a brief insight on this controversy.

This thesis reiterates that not only does it consider development and some other so-called "non-economic/commercial" social issues, such as human rights, as essential concerns of the trading institutions, it also considers them as the primary value upon which the multilateral trading system and its institutions should operate. Otherwise, the IEIs will continue to face the persistent dilemma of having to settle endless contentions between development objectives and other values. This situation has also been consistently stated as the major factor hampering the attainment of most of the SDGs.[584] In this interest, the next section will rely on legal and normative arguments to propose practical measures that could improve the equitable nature of the subsidy regime. This thesis specifically proposes the introduction of a special category of subsidy as a means to integrate development-centred principles in the SCM Agreement. This proposal will also require the amendment of the SCM Agreement.

4.5.1. The Establishment of Non-Actionable Developmental Subsidies

In the WTO discourse, issues pertaining to development are hardly conceived outside the scope of SDTs. This magnifies the perception that development concerns are mostly discussed as exceptions to the general trading rule as opposed to being treated as part of the mainstream policy. Operationalising the first of the five conceptual principles discussed in chapter 3 in relation to subsidies,[585] therefore requires integrating development principles into the mainstream provisions of the agreements. This thesis, therefore, proposes that one practical way of advancing a development-consistent subsidies regime is by establishing a third category of subsidy, in addition to the existing prohibited and actionable subsidies, to be known as the non-actionable developmental subsidies (NADS). The NADS would share minor similarities with the elapsed non-actionable subsidies in Article 8 of the SCM Agreement. However, they will significantly differ in terms of their nature, scope, and underlying purpose.

The proposed NADS are significantly inspired by the infant industry economic theory, which serves as a rationale to protect infant industries against external competitive pressures until they

[584] See generally section 3.2.6.
[585] In section 3.5.1, the first principle canvasses the need for development to be the central objective of international trade policies.

mature and develop to such an extent that they can conveniently rival their foreign competitors.[586] The practicality and credibility of the theory have been pointed out in different sections of this chapter, particularly as adopted by both developed and some developing countries. The most recent successful example of the implementation of policies based on the infant industry theory is its radical application by some East Asian countries.[587] Furthermore, the NADS is also inspired by the need to accomplish certain essential human rights and development objectives, especially as enshrined in various human rights instruments that acknowledge economic, social and cultural rights. This would also be in consonance with the UN SDG goals and the stated objectives of many international bodies to eradicate poverty and promote shared prosperity. While some of these considerations might be considered as irrelevant to some, such as the economic and legal positivists, because they are largely categorised as non-economic values, this thesis emphasises (as already argued in multiple sections) that such considerations should be the primary and most essential goals of the trading system. Another apparent motivation for the idea of NADS is because the current provisions that were formulated to tackle development concerns in the SCM Agreement (mainly contained in Article 27 as SDTs) have not satisfactorily served the purpose of their supposed development objectives. This is notwithstanding the fact that Article 27 also recognises that "subsidies may play an important role in economic development programmes of developing country Members".

4.5.1.2. The Idea of the Non-Actionable Developmental Subsidies

Before exploring the details of how the NADS should operate, it is essential that its objectives are well defined. This is because this thesis opines that most of the current development provisions (mostly in form of SDTs) in the WTO Agreements are normatively and pragmatically deficient partially because of their lack of definite development purpose. This thesis argues that the specific development objectives of the provisions that are aimed at advancing development purposes should be made explicit in order for them to serve as an objective guide for the formulation, implementation and adjudication of the relevant provisions. This may be capable of reducing the usual inconsistencies that exist between the current SDT provisions and actual development goals.

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[586] It is often cited that the infant industry theory was developed by two economists: Alexander Hamilton and Friedrich List.
[587] See section 4.4.1.3 for discussion on the "East Asian Miracle".

For instance, if a definite development objective had guided the drafting of certain SDT provisions, there would hardly be any credible development basis to justify the general time limits usually imposed on all classes of developing countries without the consideration of their specific development needs. Also, it is most unlikely that the SCM Committee would decide to phase out the practice of granting extensions to certain developing countries for the use of EPZs, as discussed under section 4.4.1.3. Similarly, this could also have positive implications for the Panel and the Appellate Body when they are faced with the dilemma of declaring subsidies that are clearly aimed at promoting environmental sustainability, which is a legitimate development concern, as inconsistent with the WTO laws.[588] Thus, stating the specific development goal of every development-focused provision unambiguously would also advance the transparency requirement which was discussed as the fourth conceptual principle for the realisation of global economic fairness in section 3.5.4. It would also consistently commit the minds of trade policymakers and negotiators to the fact that the trade policies are to be premised on certain ideas and objectives which are required to be accomplished as part of the customary legal obligation to co-operate in the realisation of development. Finally, a clearly defined development objective will also serve as a basis through which activists, academics, NGOs, and other pressure groups may evaluate the consistency of trade policies with their development agenda, in advancing the transparency of the process.

In the context of the proposed NADS, its foremost objective should be how it can enable developing countries to develop their domestic industries to such an extent that they can compete against other competitors. As earlier stated, this objective is founded on the infant industry economic theory and its connection to industrial development. As such, provisions that aim to facilitate this objective must be practical enough to achieve this end, without hindrances such as time limitations, lack of enforceability, or other impediments that could render this objective unattainable. This would also mean that the development objective should be considered above other competing values, especially trade liberalisation. Trade liberalisation is specifically mentioned here because a closer observation of the SDT provisions in the SCM Agreement would easily reveal that trade liberalisation objectives are treated as the ultimate end, while the

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[588] *See for example*, Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R (2013).

development-focused provisions are mere interim measures. It would only be appropriate and more development-consistent if the termination of development-centred provisions is determined by the accomplishment of their development objectives, rather than arbitrary time limitations that do not take into account if the problems they seek to remedy still subsist.

Beyond the justification of NADS on the basis of the infant industry measures and industrial development, another central objective of the proposed NADS is to advance a subsidy regime that grants sufficient policy space for the implementation of strategies that can aid other essential socio-economic development goals, such as poverty alleviation, education, food security, regional development, employment, research and development, environmental sustainability, and other similar major development concerns to both developed and developing nations. Some are regarded as human rights (in the economic and social rights context), and they also form the basis for the RTD. This objective is also in conformity with the third conceptual principle discussed in section 3.5.4, which advocates the mainstreaming of human rights in international trade policies and agreements. Also, all these concerns form part of the UN's 2030 SDGs, which have been officially described as "an urgent call for action by all countries - developed and developing - in a global partnership".[589]

4.5.1.3. Characteristics of the Non-Actionable Developmental Subsidies

As the name suggests, the ambition of this proposed class of subsidy is to shield (or limit in some cases) the usage of certain kinds of subsidies from potential countervailing actions. This would mean that subsidies that fit into this classification would be deemed as non-specific within the meaning of Article 2 of the SCM Agreement. It would also mean that subsidies that qualify under this category would be exempted from the general prohibition and actionability of subsidies under Article 3 and Part III of the SCM Agreement respectively. The NADS would exist for the sole purpose of properly defined and justifiable development objectives, and it is aimed to guarantee sufficient policy space for Members that wish to implement such subsidies for the exclusive purpose of legitimate development goals. Furthermore, subsidies under the NADS category are not intended to be perpetually applicable to Members that qualify for its usage. Instead, they are

[589] 'The 17 Goals | Sustainable Development' <https://sdgs.un.org/goals> accessed 30 April 2021.

only intended to be implementable until such time when the market failure or the development concern they seek to remedy ceases to exist or becomes irrelevant.

Unlike the expired non-actionable subsidy category that existed only for three specified kinds of subsidies (i.e., certain research-related subsidies, regional subsidies, and environment-related subsidies), NADS is proposed to encompass a combination of some specified kinds of subsidies and unspecified ones. The specified ones would be of two categories – those that would be generally applicable to all Members regardless of their development status for critical global development intervention (hereinafter referred to as 'general NADS' (G-NADS)), and the second category of specified NADS, which would only be applicable to Members of certain development status for peculiar needs (hereinafter referred to as 'specific NADS' (S-NADS)). Furthermore, the third category of NADS is the unspecified NADS (U-NADS), which would be determined according to the pressing development needs of specific Members. The purpose for having an unspecified category is to provide some flexibility which can accommodate the varying developing interests of different Members. Insights will be provided for each of these categories below.

As for G-NADS, this class of NADS is aimed at tackling development-related issues that are of pressing concern to all Members, notwithstanding their development categorisation. This is in acknowledgement of the fact that some development matters are equally concerning to all Members, and there is need for global co-operation in resolving them. It is also in acknowledgement of the fact that developed jurisdictions could also be constrained from implementing adequate policies to tackle such development challenges, just as their developing counterparts. Such pressing matters of global concern would have to be determined from time to time based on credible studies establishing their importance.

As an example, this thesis proposes that due to the fact that environmental sustainability is a universal and urgent development concern that leaves no section of the planet out, it is essential that the SCM Agreement classifies subsidies that are aimed at achieving environmental sustainability (otherwise known as "green subsidies") as G-NADS, which would be applicable to all Members without exception. The universal importance attached to environmental subsidies is based on the numerous academic, scientific, and policy documents that emphasise the imminent problems affecting the planet, and the need for swift and pragmatic policies to reverse the status

quo.[590] However, as the WTO jurisprudence currently stands, the policy space to implement environmental development strategies is significantly constrained through the prohibition or actionability of certain types of subsidies in the SCM Agreement. It is also controversial if the general exceptions of the GATT (which could create some exceptions to derogate from the strict interpretation of the SCM Agreement) could be relied upon to implement environmental development policies through subsidies. This is partly because the wording of the provision of GATT Article XX (on general exceptions) reads "nothing in *this Agreement*" which is held to have restricted its applicability to other WTO agreements. The Panel held in *China – Renewable Energy* that GATT Article XX (on general exceptions) cannot be invoked to justify WTO breaches in non-GATT agreements except if the provision has been expressly integrated into the Agreement.[591] Alas, the SCM Agreement does not expressly provide for general exceptions. Although, some authors such as Rubini have expressed that the requirement to expressly stipulate the applicability of the general exceptions in every WTO agreement as imposed by the Panel is "unduly restrictive and, most importantly, clearly wrong under general principles of interpretation".[592] Likewise, some also argue that the decision of the Appellate Body in *China—Audiovisual Entertainment Products,*[593] where it was held that Article XX of the GATT could apply to China's Protocol of Accession, serves as an indication that Article XX could be applicable beyond the scope of just the GATT.[594]

Notwithstanding the legal debates on this issue, this thesis opines that matters of extreme development urgency, such as environmental sustainability, should never be primarily discussed within the context of exceptions, or left to the uncertain outcome of quasi-judicial interpretations.

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[590] See generally, Angelica Rutherford, 'The Applicability of the Law of the WTO to Green Energy Security' in Angelica Rutherford (ed), *Energy Security and Green Energy: National Policies and the Law of the WTO* (Springer International Publishing 2020).

[591] Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/ DS394/R, WT/DS395/R, WT/DS398/R, (2011), paras 7.154 and 11.3; Along the same lines see Appellate Body Report, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, (2012), para 303.

[592] Luca Rubini, 'Ain't Wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform' (2012) 15 Journal of International Economic Law 525, 565.

[593] Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (2010).

[594] See generally, Joost Pauwelyn, 'Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on China - Audiovisuals Case Note' (2010) 11 Melbourne Journal of International Law 119; Paolo D Farah and Elena Cima, 'Energy Trade and the WTO: Implications for Renewable Energy and the OPEC Cartel' (2013) 16 Journal of International Economic Law 707.

This controversy re-echoes this thesis's first and third conceptual principles that advocate the centralisation and mainstreaming of development and human rights concerns into the main body of WTO rules and policies. It is incumbent, as a matter of development as a value, that the SCM Agreement does not continue to be a clog in the wheel of the implementation of subsidies that are aimed at promoting environmental sustainability. This also significantly forms the basis of the fifth conceptual principle which advocates for global social responsibility on such matters.

It must be emphasised that the kinds of subsidies mentioned under the various categories of NADS are not intended to be exhaustive. This thesis favours a flexible subsidies/trade regime where development policies could be implemented without difficulty when most needed, provided that they are in conformity with reasonable and objective criteria to be determined by a committee of relevant development experts. For instance, another kind of subsidy that could be considered under G-NADS, other than green subsidies, are subsidies that are aimed at addressing global health emergencies, like the COVID-19 pandemic. It goes without saying that the protection of human lives and health are at the core of human rights and development concerns – and they should necessarily trump other competing economic values, according to the conceptual principles that form the basis of this critique. Possible subsidy issues that could be associated with global health concerns include the actionability of research and development subsidies for vaccines (or possible cure) and export support by governments. However, if such subsidies are protected under the G-NADS category, the fact that research and development for industrial purposes could be actionable or that export subsidies are generally prohibited would be immaterial in the context of those specified subject matters.

As for the S-NADS, the objective of this category is to ensure policy space for industrial strategies that have been proven to be essential for less-industrialised countries to attain export competitiveness, based on the infant industry theory. This category would entirely prevent (or limit in some cases) the use of countervailing actions against subsidies that are specified under this group for less-industrialised jurisdictions. For example, the importance of some types of export subsidies (such as EPZs) and local content subsidies to the industrial development of less-industrialised jurisdictions have been discussed in sections 4.4.1 and 4.4.2. Various development economists, as earlier cited in different sections of this chapter, have also emphasised the impracticality of less-industrialised countries to attain an improved development and economic

status without the policy space to implement those kinds of subsidies.[595] As such, it is proposed that S-NADS should comprise export subsidies, local content subsidies, and any other kind of subsidy that could be relevant in achieving the above stated objective, based on objective, transparent and credible economic and development findings.

The extent to which the S-NADS categorisation should protect its beneficiaries from countervailing actions should vary depending on the development levels of countries. LDCs, for instance, should be entirely protected from countervailing measures, when they adopt any of the policies within the S-NADS category. This is premised on the assumption that LDCs are not economically strong enough to implement trade policies that could reasonably hurt the development interests of other Members in the global marketplace. As for other developing countries, the extent of their ability to implement S-NADS for development purposes and the limitation of their exposure to countervailing actions should vary based on their development levels. The current development classification of the WTO, which ranks various countries of extreme economic and development disparity as "developing countries", would most likely be unhelpful for a pragmatic development policy. Thus, the threshold for individual developing countries could be set according to their Gross National Income per capita (GNI per capita)[596] or even their Human Development Index (HDI).[597] For instance, the World Bank's categorisation of countries based on GNI per capita may be adopted (or modified) in deciding the various limits or extent to which countries may adopt the S-NADS.[598]

As for the last category of NADS, which is the U-NADS, the kind of subsidies that would operate under this class would be determined according to the most pressing development needs and objectives of various less-industrialised jurisdictions. The purport of the U-NADS is to create sufficient flexibility for Members of various industrial and development interests to introduce

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[595] Chang (n 425).
[596] The GNI per capita is preferred above the GDP by organisations like the World Bank and used by the EU to calculate the contribution of member nations, because it focuses on income rather that output, and therefore, considered as a better measure for economic well-being.
[597] The HDI is the most preferred to development economists and primarily guides the policies of the UNDP, because in addition to GNI per capita which gives a hint on the standard of living, it is also composed of other socio-economic development factors, such as life expectancy and education.
[598] The World Bank categorised countries based on GNI per capita into higher income (12,536 USD or more), upper middle income (4,046 USD - 12,535 USD), lower middle income (1,036 USD - 4,045 USD), and low income (1,035 USD or less).

subsidies that are relevant to their development goals. Thus, unlike G-NADS and S-NADS that both have specified kinds of subsidies for specific objectives, U-NADS should be determined according to the national development priorities of relevant Members. This would be consistent with mainstream development views that countries' development needs and policies are best understood and implemented by domestic policymakers as opposed to opinions of foreign experts. This would also be consistent with the fourth conceptual principle that argues for equality of participation and transparency in the policy making process. Furthermore, the burden of establishing the development need(s) that would require the implementation of a subsidy policy that is intended to be protected under the U-NADS would be upon the Member seeking to adopt such subsidy measure. This would mean that the permissibility of certain kinds of subsidies for one developing jurisdiction would not necessarily entitle others to implement such subsidy measures. Otherwise, it would be almost impossible to conceive an equitable subsidies regime where the rules would realistically accommodate the development objectives of large developing countries like Brazil, China, India, landlocked countries like Chad and Nepal, and small islands such as Samoa and St Lucia.

This thesis's proposal on limiting countervailing actions for developing countries shares some similarity with what Lee termed "development facilitation subsidies" (DFS).[599] However, while NADS shares a similar objective with DFS in terms of their commitment to development in the subsidy regime, the two proposals significantly vary in terms of scope, beneficiaries, and categorisation. Among the differences between DFS and NADS is the fact that Lee's conception of development agenda is limited to only developing countries, which gives no room for matters of universal development concern that are covered under G-NADS.[600] Similarly, DFS seems to focus mainly on the prohibition on export subsidies and import substitution subsidies under Article 3 of the SCM Agreement.

In conclusion, the goal of this chapter is to demonstrate how an equitable and development centred policy can be incorporated and operationalised in the SCM Agreement. NADS represents a conceptual sketch of how such policies could be integrated into the subsidies regime. However, it

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[599] Lee (n 541) 948–953.
[600] This thesis differs with Lee on his view that development policies like the DFS are only relevant to developing countries. *See* ibid 951.

must be emphasised that much of the detail in terms of the kind of subsidies that should be under the various categories and the threshold for countries of different levels of development would be open for deliberations, and particularly, to the competence of development experts, economists, policymakers and other relevant professionals.

5.0. FINAL RECOMMENDATIONS AND GENERAL CONCLUSION

In chapter two, this thesis relied on the combination of historical, economic, and legal analyses to establish the inherent unfairness of the international economic order. Thereafter, it proposed five equity and development-centred conceptual principles that were distilled from the theoretical lenses of the RTD, global distributive justice, and TWAIL, as normative remedies that can facilitate the realisation of fairness in the global economic order in chapter three. Furthermore, this thesis normatively critiqued aspects of the international subsidies regime, being the case study, through the five conceptual principles, with substantive proposals to improve the SCM Agreement. This chapter will therefore conclude the thesis by providing two broad-based recommendations on how the development-centred concerns, particularly the conceptual principles, can be operationalised in WTO agreements and adjudicatory processes in general. Specifically, section 5.1 explores the concept of *grundnorm* in relation to international trade law, with the aim of proposing how the development-centred principles may be adopted as superior legal norms against which the validity of trade agreements, policies, and other competing legal norms can be assessed. Furthermore, due to this thesis's multiples criticisms of the SDT provisions contained in various WTO agreements, Section 5.2 provides some final thoughts on how the SDT provisions can be improved and operationalised to serve actual development objectives. Finally, section 5.3 provides the general conclusion of the thesis.

5.1. The Adjudication of Development Concerns in the WTO Context – Exploring the Concept of *Grundnorm*

It is one thing to have clearly articulated provisions, such as NADS, for the advancement of development concerns in the SCM Agreement. It is, however, another hurdle for the development objective(s) of the provision to be acknowledged, or even taken into proper consideration while adjudicating such relevant provisions. This has been a consistent issue with the WTO dispute settlement bodies, especially in relation to the interpretation of SDT provisions. As already pointed out in multiple sections of this thesis, case law has rendered many SDT provisions (which serve as the main approach to development in WTO Agreements) non-operational on different grounds. Such grounds include the use of hortatory expressions by the drafters of the agreements or the mere fact that the implementation of such SDT provision is impractical in the view of the WTO

adjudicatory bodies.[601] Many other SDTs have simply elapsed, because they were only applicable for a limited period, even where the development problems they were enacted to solve are still present. This thesis strongly opines that these development-unfavourable stances occur largely because of the normative value that underlies how the adjudicators conceive trade relations. Without a doubt, the prevailing approach of the policies and adjudications emanating from the neo-liberal inspired international trading regime favours trade liberalisation above other normative values. Therefore, as exemplified in multiple cases and policies analysed in this thesis, conflicts that arise between the liberalisation of trade and other values like development and human rights are mostly settled in favour of the former.[602] This prevailing approach is the basis of this thesis's divergence with the IEO. Therefore, this thesis proposes that the equity and development centred normative approaches, as expressed through the five conceptual principles for the realisation of economic justice in section 3.5, can be operationalised through their recognition as the *grundnorm* of the international economic and trade law, and particularly the WTO adjudicatory bodies.[603] To restate, the five conceptual principles are the adoption of development (both in its theoretical and human rights forms) as the central objective of international trade; the reimagination and operationalisation of the idea of differential treatment in trade policies; mainstreaming human rights in international trade policies and agreements; entrenching the ideals of equality of participation and transparency in international trade negotiations; and the expansion of global social responsibility which should promote mechanisms to ensure that participants in the international economic/business relations imbibe ethical values that would eliminate practices that hurt vulnerable humans and the environment.

The concept of a *grundnorm* – basic norm –[604] is generally understood as the underlying legal principle or normative value against which all other legal norms can be assessed (akin to the concept of first principles in philosophy). It is the fundamental principle in which every legal

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[601] For discussions on the limitations of the SDT provisions, see sections 2.4.2 and 3.5.2.
[602] For instance, the policy of the Subsidies Committee to phase out its practice of granting extensions to developing countries for the use of EPZs, or multiple decisions where the Panel or Appellate Body have refused to uphold SDT provisions in reliance on different technical justifications.
[603] This idea has been suggested in section 3.2.6 and 3.5.3 of this thesis.
[604] Translated from German.

enactment, regulation, or policy mirror to test their validity.[605] In essence, the concept of *grundnorm* establishes a hierarchical legal order in which certain legal notions, derived from and justified by normative concepts, are considered superior to all other legal norms and provisions. Therefore, any legal provision or policy that conflicts with the *grundnorm*, even if duly enacted by a competent authority, would still be declared null and void to the extent of its inconsistency. Examples of basic norms that sometimes operate as the *grundnorm* in today's context, particularly in national legal systems, include the rule of law, the idea of justice, and human rights. While the concept of *grundnorm* is usually associated with the Austrian legal philosopher, Hans Kelsen, the formulation of the idea (in the European legal philosophy) can be ascribed to Immanuel Kant (even though he did not specifically use the term) in his work titled *The Metaphysics of Morals* (which commenced with a treatise on the philosophy of law).[606] Unlike Kelsen's idea which is grounded in legal positivism, and therefore perceives the *grundnorm* as an epistemological premise, Kant's idea of the basic norm differs in the sense that he postulates that all positive laws ought to be grounded in "natural" norms of general acceptance and reasonableness (*Vernunft*) in order to prevent arbitrariness (*Willkür*). Thus, only norms that can be assumed to reflect a reasonably defined common interest can be defined as the basic norm, according to Kant's perspective. In relating this to the argument of development and human rights as the *grundnorm* of the international economic and trade law from the Kantian premise, one could rest on the assumption that the global cooperation for development and the obligation to commit to respecting and protecting the survival of humanity and even the planet through trade policies is a dictate of reason (*Gebot der Vernunft*) and general acceptance (*allgemeine Gültigkeit*). Since the Kantian perspective seems to emphasise the prevalence of common interest based on reasonableness and general acceptance, it is unlikely that a reasonable person would deny the significance of development and human right concerns above pure commercial interests.

An example could also be drawn from domestic legal systems, in which a number of values have been suggested as their *grundnorm* – most of which have been incorporated into the body of positive laws like national constitutions. Prominent examples in most liberal constitutional

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[605] Hans Kelsen, *Pure Theory of Law* (University of California Press 1967); See also Uta Bindreiter, *Why Grundnorm?: A Treatise on the Implications of Kelsen's Doctrine*, vol 58 (Springer Science & Business Media 2002).
[606] Bindreiter (n 605) 15.

democracies include provisions on certain fundamental human rights. Fundamental human rights provisions in many jurisdictions have been incorporated into constitutions, and as such rank higher above any other parliamentary legislation or government policies. Therefore, any contradiction of such constitutionally guaranteed human rights by any other law of parliament or government policy is considered a constitutional violation, subject only to the justified and proportional limitations usually specified by the constitutions themselves. This is a well-established practice in countries like Germany, India, Nigeria, or the United States, where laws or executive policies can be challenged in courts and declared null and void on the basis of their violation of the constitutional provisions.[607]

In the international law context, some of such norms have also been a subject of academic discourse, such as human rights, rule of law, justice, and even environmental sustainability. Different authors have written to advance the *grundnorm* theory in different contexts of international law. For instance, Mendes and Voigt have written on the idea of human rights[608] and the rule of law[609] respectively as the *grundnorm* of international law. Similarly, Kim and Bosselmann have also argued for the adoption of ecological integrity as the *grundnorm* of international law, in advancing their position on the operationalisation of sustainable development.[610] In following a similar pattern, this thesis also argues that development and human rights, as opposed to trade liberalisation, should be recognised and upheld as the *grundnorm* of international economic and trade law. As a default law, development and human rights as the *grundnorm* of the WTO would guide and underpin the interpretation of existing WTO Agreements and the creation of subsequent policies. As a fundamental adjudicatory norm, it would help build a systemic relationship between trade agreements and policies by envisaging them as part of the shared purpose. Also, the express proclamation of specific norms as the *grundnorm* of the international trading system would also limit the scholarly contentions on whether the international

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[607] See, Basic Law of the Federal Republic of Germany, Article 93(1); Constitution of India, Section 13; Constitution of the Federal Republic of Nigeria, Section 1(3); Constitution of the United States of America, Article VI, Clause 2.
[608] Errol P Mendes, *Global Governance, Human Rights and International Law: Combating the Tragic Flaw* (Routledge 2014).
[609] Christina Voigt, *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge University Press 2013) 75.
[610] Rakhyun E Kim and Klaus Bosselmann, 'Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law' (2015) 24 Review of European, Comparative & International Environmental Law 194.

economic and trade law is entirely autonomous from other international legal rules. Those who opine that international trade law is not entirely autonomous of the general international legal rules mostly do so in order to integrate important international legal instruments, such as human rights and environmental protection treaties, into the trading rule. But the express adoption of those intended principles as *grundnorm* would limit the relevance of such debate, especially between the American and European international economic law scholars.

Development and human rights can be integrated as the *grundnorm* of international trade relations through various means. One possible means is by expressly integrating a clause in WTO agreements, akin to the supremacy clauses in some domestic constitutions,[611] which will establish these norms as the most fundamental values in which no agreement or policy should contravene. Such a clause could be referred to as the 'Development Supremacy Clause' (DSC). By implication, the DSC would empower the adjudicatory body to prioritise development concerns while interpreting WTO agreements, especially when faced with a competing norm. A draft example of a potential DSC could read as follows:

> Nothing in this Agreement shall be interpreted to contravene fundamental development concerns as understood by the United Nations Declaration on the Right to Development and as amplified by the United Nations Agenda on Sustainable Development and other extant human rights instruments, particularly the international bill of rights. Any conflict arising between the express provisions of this Agreement and such development concerns, especially which has the proven capacity to negatively impact the Human Development Index (HDI) of any Member directly or indirectly, shall be settled in favour of the latter, and such inconsistent provision shall be null and void to the extent of its inconsistency.

The understanding of development according to the UNDRD is adopted here because it remains the major international instrument that recognises development as both a process and human right and expressly acknowledges and incorporates other major human rights instruments such as the

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[611] A supremacy clause is generally understood as a provision, usually in written constitutions, which establishes the priority of constitutional provisions or other enactments over other legislation.

Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.[612] Also, this thesis adopts the HDI as the measure to determine the impact of policies on development because it has been adjudged, notwithstanding its limitations, as one of the most accurate measures of determining economic and welfare development. This is also the measure adopted by most development economists and the UNDP, as opposed to other measures like the GDP. It is described as a summary measure of the average achievement in crucial aspects of human development, which include long and healthy life, access to knowledge, and a decent standard of living.[613] The UNDP states that this measure was created in order to "emphasise that people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone".[614] This measure also appears to be in more conformity with the ambition of global justice and the human right to development which places humans as its central object. Furthermore, this kind of measure is especially important considering the abundant empirical studies that have established the link between trade policies and development outcomes such as global poverty, employment, technology, education, life expectancy, and other fundamental concerns.[615]

A provision like the DSC can either be enshrined in all WTO agreements or expressed in a special agreement that would be made binding on other specific agreements. However, the potential problem with the latter is that a situation could arise where the applicability of such agreement to another could be challenged. This is similar to the current controversy on the applicability of the GATT provisions on the "general exceptions" to the SCM Agreement, mainly because the SCM Agreement did not expressly adopt the general exceptions. Alternatively, the DSU could also be amended to include the DSC in a manner that would be accordingly adapted for a general purpose, just as Article 3.2 of the DSU empowers adjudicatory bodies to interpret the WTO agreements in accordance with the customary rules of interpretation of public international law.

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[612] UNDRD, Preambular paragraphs 2, 3, 4, and 5.
[613] 'Human Development Index (HDI) | Human Development Reports' <http://hdr.undp.org/en/content/human-development-index-hdi> accessed 30 April 2021.
[614] ibid.
[615] *For example, see,* Antony Davies and Gary Quinlivan, 'A Panel Data Analysis of the Impact of Trade on Human Development' (2006) 35 The Journal of Socio-Economics 868.

Overall, the crux of this thesis's recommendation to recognise and integrate the five conceptual principles as the *grundnorm* of international trade law is to ensure that the current problems associated with development provisions, which have been rendered non-operational, are reduced, if not totally eliminated. At the moment, the pathways that could be relied upon in arguing development and human rights concerns, especially in the context of the SCM Agreement, are inadequate and not satisfactorily authoritative. For instance, while the DSU empowers to adopt the customary rules of interpretation, which by extension includes the adoption of a purposive approach for the interpretation of treaties as provided for under Article 31 of Vienna Convention on the Laws of Treaties, the lack of adequate affirmations of development as the basic norm of the WTO leads to development-unfavourable interpretations of many development-focused provisions in WTO Agreements.[616] Thus, an unequivocal affirmation and adoption of development and human rights as the *grundnorm* of WTO law will not only improve the adjudicatory process in favour of development concerns but would also further advance the systemic integration of Article 31 of the Vienna Convention on the Law of Treaties in the WTO jurisprudence. Similarly, controversies such as over the applicability of the general exceptions to green subsidies, in light of the Panel's interpretation in *Canada – Renewable Energy* should no longer be an issue in a regime that has adopted development as its *grundnorm.* In the wider UN context, this would also reduce the tensions between WTO trade policies and some of the SDGs.

5.2. Concluding Thoughts on Special and Differential Treatment Provisions

Notwithstanding their normative and pragmatic inadequacies, SDT provisions remain the main method through which development concerns for developing countries are expressed and implemented in WTO law. The general idea of differential treatment for countries that are less well-off in the global distribution of economic benefits is justifiable under the global difference theory, the RTD and the TWAIL approach, which underscore the conceptual principles upon which this chapter is critiqued. Particularly, the second conceptual principle for the realisation of global economic justice, as suggested in section 3.5.2 of this thesis, emphasises the need to operationalise the SDT provisions in order to guarantee a fair and equitable international trading

[616] For example, see Section 4.4.1.1 for this thesis's argument that the development purpose of Article 27.2(b) of the SCM Agreement was not adequately considered by the Panel in *India – Export Related Measures.*

system. However, while the general idea of SDT appears to be a suitable tool towards the realisation of development objectives, its implementation in the WTO has been unable to address fundamental issues, such as inequity in the trading system, unbalanced rules where the cost of implementing the trade rules have been higher than the benefits for many developing countries, the incapacity of many developing nations to adequately participate in the trading system, among other issues. Also, multiple SDT provisions and their interpretation have been criticised in different sections of this thesis for their inability to realise their expected development functions. Moreover, one of the major constraints that impeded the progress of the Doha Round was how to address the demands of developing countries for more effective SDT provisions. This is despite the fact that the Doha Ministerial Declaration affirmed the importance of SDT provisions by stating that SDT provisions are an integral part of the WTO agreements, and it even called for a review of the SDT provisions with the objective of "strengthening them and making them more precise and operational".[617] There are already abundant economic, political, legal and philosophical proposals on why and how to improve the SDT provisions – many of which have been discussed under various sections of this thesis. But this section will briefly emphasise some germane points for the improvement of SDT provisions.

Firstly, there is the need to ensure that SDT provisions are enacted to work towards achieving defined development objectives, through which the success of the policies can be evaluated. A significant number of SDT policies are not justifiable when evaluated through any credible and objective development lens. They seem to have been reluctantly included in the agreements in order to persuade Members with the most pressing development interests to adopt the agreements without hindrance. Drafting SDT provisions with defined development objectives in mind would not only guide the policymakers towards enacting more reasonable and practical development policies but would also show their genuine commitment towards development concerns – which could improve the legitimacy and transparency of the multilateral trading system, at least in the view of most developing countries. For instance, SDT provisions in the context of the SCM Agreement should specifically aim to facilitate the development of its beneficiaries' infant industries and remove the clogs that could hinder the attainment of their global competitiveness.

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[617] Doha WTO Ministerial Declaration, para 44.

As such, temporary SDT policies that do not take into consideration whether any development progress has been achieved as a result of the policy upon their expiration are arguably not drafted with the aim of attaining specific development goals. Otherwise, the status quo will only continue to affirm the central argument of the proponents of the dependency economic theory that the poorer countries' integration into the global economic order and the policies imposed upon them would only continue to keep them in a position where their only comparative advantage in the global value chain would perpetually be raw materials and cheap labour.[618]

Secondly, the improvement of SDT provisions and other development concerns should not only be considered when it becomes a subject of protest at the level of trade negotiations, there is the need for the trading system to establish and strengthen both internal and external mechanisms for the advancement as well as evaluation of the success or failure of development policies. This would serve as appropriate checks and balances to ensure the proper observation of development concerns against other competing interests. While the WTO already has the Committee on Trade and Development with five main mandates that seek to ensure beneficial participation of developing countries and LDCs,[619] this thesis proposes that the committee's mandate should be enlarged in order for them to be actively involved in the negotiation and policymaking processes. Thus, their mandate should not only be limited to a "periodical review" of development-unfavourable policies after they have been implemented and would then require bureaucratic processes to revoke. Beyond the internal mechanisms like the Trade and Development Committee, external bodies, such as NGOs that are dedicated to various aspects of international development works, need to be involved in the WTO negotiations and policymaking processes. This would also help the WTO to improve on its transparency and public accountability, which has already been alleged as "probably the most non-transparent of international organisations".[620] Participation of NGOs is particularly important for the advancement of development concerns as the UN described them as "catalytic elements in the realization of the right to development".[621] This would also be an appropriate path towards fulfilling the objectives of the 4th and 5th conceptual principles of this

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[618] See section 2.3 of this thesis for discussion on the dependency theory.
[619] *See* WTO Committee on Trade and Development – Decision by the General Council on 31 January 1995, WT/L/46.
[620] 'Transparency, Participation, and Legitimacy of the WTO' <https://twn.my/title/legit-cn.htm> accessed 30 April 2021.
[621] UN Doc. E/CN.4/1994/21 (1994), para 38 (c).

thesis, which emphasise the need for transparency and the improvement of the social responsibility of private actors in the multilateral trading system.

Thirdly, there is the critical need to reconsider the development categorisation of countries in which the WTO currently operates. The generalised categorisation of countries of significantly diverse economic capabilities as "developing countries" also hinders the successful negotiation of appropriate development needs for countries with specific pressing development needs. The development policies, including SDT provisions, should be designed in a way that is consistent with the peculiar circumstances and development priorities of Members. One does not require much grounding in economics to realise the significant distinction between China and Angola, and the fact that their development priorities and required approaches would significantly differ. The current generalised classification of developing countries, which includes countries that are substantially industrialised and globally competitive in some industries, also contribute to negotiation deadlocks that are usually detrimental to the development of the less-industrialised developing countries.

Notwithstanding all the above, this thesis opines that discussions about development in the WTO should not only be restricted to the effectiveness of SDT provisions. While SDT could be a valuable tool to achieve development goals, it is only one of the various ways through which development concerns can be integrated into the trading system. Also, limiting the discussion on development to the improvement of SDTs alone relegates the importance of development to the status of a mere exception to the general rule or a postscript. As Ismail describes, "development is thus regarded as an afterthought, as a nice to do, or at worst an optional extra".[622] Instead, development concerns, such as poverty, starvation, and unemployment, should be mainstreamed into the main body of rules and policies of the WTO agreements.

5.3. General Conclusion

This research converges both theoretical/normative analysis, on the one hand, and the critique of international trade law, on the other hand, in establishing the unfairness of the international

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[622] Faizel Ismail, 'Mainstreaming Development in the World Trade Organization' (2005) 39 Journal of World Trade 11, 12.

economic order, and offering proposals to remedy the unjust status quo. The contributions of this thesis to the intersection between global justice, development and international trade law can be divided into two broad parts.

The first part, mainly in chapter three, contributes to the theoretical understanding of fairness in international economic law through the distillation of five overarching, interconnected, and complementary conceptual principles that are rooted in the philosophies, ethics and values of global distributive justice, the right to development and the TWAIL. To reiterate, the five conceptual principles are the adoption and integration of development (both in its theoretical and human rights forms) as the central objective of international economic and trade policies; the operationalisation, reimagination, and restructuring of the idea of differential treatment in trade policies; mainstreaming human rights (including economic, social, civil and political rights) in international trade policies and agreements; entrenching the ideals of equality of participation and transparency in international trade negotiations and other economic practices; and the expansion of global social responsibility which should promote mechanisms to ensure that participants in the international economic/business relations imbibe ethical values that would eliminate practices that hurt vulnerable humans and the environment.

Beyond the novelty of the five conceptual principles that are particularly justified from the viewpoints of the three theoretical/normative approaches, this thesis, in chapter three, also individually explored some crucial discussions surrounding the three approaches that may be of concern to academics, policymakers and activists for, perhaps, future deliberation and development. An example of such is the discussion concerning the recognition and legal status of the right to development (which is not limited to the UNDRD) in section 3.2.5, which may be argued to have attained the level of a peremptory or authoritative international law, and from which states cannot deviate (i.e., *jus cogens*). The significance of deliberating on this subject matter is in order to determine the extent of its applicability in the international political, economic and legal processes, which will therefore serve as a basis for future works/strategies for the improvement of its recognition and operationalisation.

Similarly, section 3.3.5 also explored the continuing philosophical debate on the global applicability of the difference theory of Rawls's distributive justice principles – even though Rawls himself disagreed with its global applicability. This thesis reaffirmed the positions of scholars such

as Garcia, Pogge, and Buchanan in asserting that the inherent nature of modern globalisation and global governance is sufficient justification for the obligation of the distributive justice principles in international trade relations. Relying on the mentioned authors, this thesis concluded that not only does the structure of the international economic governance satisfy Rawls's "basic structure", which is Rawls's ideal nature of society where his theory can apply, it also contradicts moral universalism, to which Rawls also subscribes, to maintain an economic order that arbitrarily discriminates in favour of the well-off societies against the global underprivileged.

Furthermore, by also bringing the Third World critical approach into the discourse of global fairness in IEO, it would help in mainstreaming the ignored historical realities, such as slavery and colonialism, that have largely shaped the present underdevelopment and dependency status of many developing countries. It also established that those historical barbarities are firmly rooted in and facilitated by international law, and which are still sustained in today's principles and hierarchical structures of international governance. As such, TWAIL helps in bringing to the fore of international legal scholarship those defining realities of the global system that are barely acknowledged in the footnotes of mainstream international legal writings, by deconstructing the erroneous pedagogy that misrepresents the present system as fair, humane, equitable, transparent, and as a product of equal participation. The realisation and acknowledgement that the IEO was built upon injustices would contribute to the consideration of appropriate policies, assuming the existence of the political will, to remedy the status quo.

Ultimately, the theoretical section of this thesis demonstrates how multiple approaches, notwithstanding their possible contestations, may be brought together in providing conceptual contributions that may remedy the unfair state of the global economic order, which has significantly contributed and continues to sustain the underdevelopment of the poorer nations. It must be emphasised that the theoretical/normative approach adopted to discuss the existing unfairness in the IEO is due to the fact that the traditional black-letter approach of analysing legal problems within an existing legal structure/idea is inadequate to remedy the fundamental normative anomaly of the IEO.

The second part of this thesis's major contribution to knowledge is the case study in chapter four, which normatively critiqued the SCM Agreement. The chapter provides both economic and legal backgrounds for the usage of subsidies in international trade law, and thereafter normatively

critiques the two prohibited subsidies under the Agreement (i.e., export subsidies and local content subsidies) through the lenses of the conceptual principles established in chapter three. Furthermore, this thesis argued, relying on the infant industry economic theory, that the SCM Agreement overly confines the policy space for developing and less-industrialised countries to implement strategies that could help in developing their domestic industrial capacities for their attainment of global economic competitiveness. The infant industry argument is relevant particularly after considering the historical fact that almost all countries that are now classified as developed had at their earlier stages of development adopted export subsidies, import-substitution, and various protectionist measures that are now prohibited for all, to develop their domestic industries. This subsidy rule, according to Chang, is literally an act of "kicking away the ladder" by the affluent countries that mainly influence the international trading rules.[623] Also, as cited in multiple sections of this thesis, the evidence of the successful implementation of various infant industry policies that include the now prohibited subsidies by some East Asian countries (referred to as the "East Asian Miracle" by a World Bank report)[624] is a justifiable economic rationale to guarantee a similar policy space for less-industrialised countries.

The restrictive provisions of the SCM Agreement that unfairly confronts the implementation of pressing development objectives by less-industrialised countries, therefore, gives relevance to the operationalisation of the five conceptual principles in the context of subsidies in international trade law. In providing a pragmatic proposal to reform the SCM Agreement, this thesis proposed the introduction of a special category of subsidy, named the "Non-Actionable Developmental Subsidies" (NADS). As mentioned in section 4.5.1.3, the general ambition of NADS is to shield (or limit in some cases) the usage of certain development-motivated subsidies that satisfy defined criteria from potential countervailing actions. While NADS represents a conceptual sketch of how equity and development-centred policies could be integrated into the subsidies regime, it is nonetheless acknowledged that aspects of the idea would still need to be deliberated upon and developed by relevant experts.

As concluding thoughts, the final chapter (in sections 5.1 and 5.2) offers two general recommendations on how development-centred concerns, particularly the conceptual principles,

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[623] Chang (n 425).
[624] World Bank (n 460).

can be operationalised in the WTO agreements and adjudicatory process. The first proposal is concerning how fundamental development objectives could be adopted as the *grundnorm* of the international trade policy process and adjudication. Inspired by Kant's idea of the basic norm, this thesis proposed the establishment of a hierarchical legal order in international trade law, in which certain legal notions, derived from and justified by the equity and development-centred conceptual principles, would be considered superior to all other legal norms and provisions. This is aimed at resolving the constant frictions that exist in the WTO policymaking and adjudicatory process between development and human rights norms, on the one hand, and trade liberalisation, on the other hand. This thesis strongly opines that the other should always prevail above the latter. Furthermore, while this research acknowledges that there could be multiple ways of achieving its *grundnorm* ambition, it suggested the introduction of a "development supremacy clause" in WTO agreements that would relegate all other competing values and considerations below the status of fundamental development and human rights concerns. Lastly, after several criticisms about the SDT provisions for their normative and pragmatic inadequacies, this thesis concluded the final substantive chapter with some thoughts on how the differential treatments could be improved and operationalised. The first is on the need to define the specific economic and development objectives of each SDT provisions, in order to serve as an instrument to evaluate their success as well as guarantee transparency. The second is the need to facilitate internal and external mechanisms to serve as checks and balances for the strengthening of WTO development policies. Thirdly, this thesis argued for the reconsideration of the current development categorisation of countries, particularly developing countries, as the status quo which categorises countries of diverse development levels into a one-size-fits-all policy grouping is not adequate for fair development policymaking. Finally, this thesis emphasised the need to innovate other tools to achieve and mainstream development objectives in the WTO law beyond SDT provisions, which reduces development concerns to mere exceptions to the general trading rules or an afterthought.

Finally, notwithstanding the contributions of this thesis to the debates on global economic justice as well as the improvement of the international subsidies regime, it, however, acknowledges its limitations in terms of scope. This is because the subject of global economic justice and the multiple dimensions involved in it is not such that can be exhausted in a doctoral thesis. For instance, while this thesis focussed broadly on the imbalance between the Global South and the Global North in its theoretical and case study analyses, other economic distributive concerns, such

as gender and racial inequities in the contexts of women or indigenous people were not covered in this thesis. Similarly, there could be other relevant theoretical and critical approaches, beyond Rawls' *Justice as Fairness,* RTD, or even TWAIL that could also be explored in relation to the international economic order. Furthermore, while this thesis has only applied its five conceptual principles to critique an aspect of the SCM Agreement (prohibited subsidies) as its case study, further research could explore how other aspects of international trade and economic relations could also be subjected to critical scrutiny of the conceptual principles. A relevant example could be how the conceptual principles could be adopted to proffer normative solutions to the global inequities and human rights challenges arising from the TRIPS Agreement, especially if one considers its effect in relation to the COVID-19 pandemic and vaccination.

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